No. 2881

No. 15181

United States
Court of Appeals
for the Ninth Circuit

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

NOV - 9 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-12-56

No. 15181

United States
Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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CHARLES K. RICE,
Assistant Attorney General;

LEE A. JACKSON,
Attorney, Department of Justice,
Washington 25, D. C.,

For Appellee.

In the United States District Court, Southern Division of the Northern District of California

No. 31,758

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE, and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, J. Patrick Daley, Minerva R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF INCOME TAXES IN EXCESS OF TEN THOUSAND DOLLARS

Comes now the plaintiffs and for cause of action against the defendant, complain and allege as follows:

I.

This is an action based on the laws of Congress, to wit: the Revenue Act of 1939 (53 Stat. 1) and is for the recovery of income taxes in excess of Ten Thousand Dollars ($10,000.00) erroneously and illegally assessed and collected by a Collector of Internal Revenue for the First Collection District of California for the United States, who is not now

in office as a Collector of Internal Revenue. The jurisdiction of this court is based on Title 28, United States Code, Section 1346 (a) (1) (ii).

II.

The plaintiffs herein are citizens of the United States of America, and reside in the State of California within the First Collection District of California for the United States Internal Revenue Service.

III.

The plaintiffs John P. Daley and Minerva B. Daley are husband and wife; the plaintiffs Morris Daley and Zelma B. Daley are husband and wife; the plaintiffs William Radtke and Clara Radtke are husband and wife, and during the years involved in this proceeding have filed separate income tax returns under the community property theory as permitted by law. The plaintiff Homer Bosse, Trustee, is the trustee of the Estates of the children of John P. Daley and Minerva Daley, namely, J. Patrick Daley, Minerva R. Daley, James D. Daley, Kathryn F. Daley and Peter Daley, under a Trust Agreement set up in 1942 by the said John P. Daley and Minerva B. Daley, and the Trustee of the Estates of the children of Morris Daley and Zelma B. Daley, namely, Morris K. Daley, Alice M. Daley and Susan R. Daley, under a trust agreements set up in 1942, and the said plaintiff Homer Bosse as Trustee of the said estates filed income tax returns as such trustee for the years involved in this proceeding. ...

IV.

The plaintiffs John P. Daley and Morris Daley for many years prior to 1942 were engaged in the general contracting business, as co-partners, and operated under the firm name and style of Daley Brothers; during such period of time they kept and maintained their books on a completed job basis, and reported their income on such basis. In the year 1942, desiring to set up a trust for the benefit of their children, they caused to have drawn up and under the date of June 30, 1942, each of said partners and their wives executed trust agreements identical in provisions and with the same trustee, differing only in the beneficiaries under each trust agreement. The said plaintiff named herein, Homer Bosse, Trustee, was therein named trustee of the said trusts, and entered upon his duties as such trustee.

V.

On June 30, 1942, and in pursuance to the design of the said John P. Daley and Morris Daley, and their respective wives, in creating a trust for the benefit of their children, they reorganized the structure of the then existing partnership, and created a new partnership, differing only from the old in that they included a limited partner, namely, the Trustee of the trust for the benefit of their children. By the terms of said limited partnership so created, the general partners, John P. Daley and Morris Daley, each contributed a certain sum of money, and the Trustee also contributed a certain sum of money, and the limited partnership agreement set

out in detail the method of sharing in the profits and losses of said limited partnership. The general partners continued to operate the general contracting business in the manner that it had operated prior to the creation of the limited partnership. The limited partnership was also known as Daley Brothers.

VI.

In July, 1942, the said limited partnership, Daley Brothers, entered into a special partnership for the sole purpose of a joint venture with William Radtke, for the bidding on contracts under an invitation to bid by the War Department. This special partnership was a general partnership between Daley Brothers and William Radtke and was known as "Daley Brothers Delta War Venture," and books and records were kept under said special designation, and in the years 1942 and 1943 Income Tax Return was made for the special partnership under such designation. On July 8, 1942, the said special partnership was successful in securing a contract with the United States Government for work to be done at Delta, Utah, and on said date entered into a contract entitled "Contract No. W-2195-eng-247," and was for the construction of The Abraham Relocation Center, at Delta, Utah. The contract was for the sum of $2,834,212.51.

The contract by its terms provided as follows:

"The work shall be commenced within one (1) calendar day after date of notice to proceed and shall be completed within sixty (60) calendar days

after such notice, to wit: on or before September 6, 1942. * * *"

"Article 3. Changes—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly."

That in accordance with said Article 3, the contracting officer did make certain changes in the said drawings and specifications under the said contract, and provided as follows:

Supplemental Agreement No. 1: Increased the amount of the contract by the sum of $362,980.00, and changed completion date to September 21, 1942.

Change Order No. 2: Increased the amount of the contract by the sum of $1,731.00, no additional time allowed for completion.

Supplemental Agreement No. 2: Increased the amount of the contract by the sum of $2,038.77, no additional time allowed for completion.

Change Order No. 3: Increased the amount of the contract by the sum of $187,644.86, and extended the time for completion to October 6, 1942.

Change Order No. 4: Increased the amount of the contract by the sum of $1,988.00, no additional time allowed for completion.

Change Order No. 5: Increased the amount of the contract by the sum of $91,213.89, no additional time allowed for completion.

Change Order No. 6: Increased the amount of the contract by the sum of $76,125.00, extended the completion date 60 calendar days to December 5, 1942.

Change Order No. 7: Decreased the amount of the contract by the sum of $57,482.94, no change in completion date.

Change Order No. 8: Increased the amount of the contract by the sum of $61,741.74, no change in completion date.

Change Order No. 9: Increased the amount of the contract by the sum of $83,344.66, no change in completion date.

Change Order No. 11: Increased the amount of the contract by the sum of $5,630.79, no change in completion date.

Change Order No. 10: No increase in amount of contract, but extended the time for completion 73 days to February 16, 1943.

That by virtue of the various change orders and supplemental agreements the contract was increased from $2,834,212.51 to $3,651,188.27, and the completion date extended from September 6, 1942, to February 16, 1943.

That said contract by its terms therein provided as follows:

"1-36. Payments.

"(a) Basis of Payment. Payment to the contractor for work included in the contract price for the work will be based on a well balanced schedule to be prepared by the contractor and approved by the Contracting Officer apportioning the total amount of the contract lump sum price among the principal items of the work included in the contract. The amount apportioned to each of the items of work shall be subdivided into labor and material costs. The material costs shall include transportation costs charged against the materials. The total amount shown by the schedule shall equal the amount bid for the contract price for the entire work.

"(b) Method of Making Payments. Payments will be made semi-monthly on estimates prepared by the Contracting Officer as to the amount of work which has been executed in accordance with the specifications and not included in any prior estimates, except that ten (10) per cent of the amount of each estimate will be retained until full completion and final acceptance of all work covered by the contract, when final payment will be made."

"1-40. Final Acceptance and Payment. When all the work called for under this contract has been completed, the Contracting Officer will make a thorough examination of the same, and, if it is found

to fully comply with the requirements of the contract, it will be accepted and final payment will be made in accordance with paragraph 1-36 hereof."

VI.

That said contract was completed on February 16, 1943, and accepted by the Contracting Officer for the War Department on February 16, 1943.

VII.

That under date of February 8, 1943, the Price Adjustment Section, Pacific Division, of the War Department Engineers, called for a statement of monies received under contracts with the United States Government during the year 1942 for the purpose of determining excessive profits realized under the Renegotiation Agreement that was a part of the Standard Contracts with the War Department, and pursuant to said request for statement, Daley Brothers submitted a statement showing monies received on the Contract W-2195-eng-247 during the calendar year 1942. The accountant for Daley Brothers, acting under the mistaken assumption that the monies received under the said contract was income for income tax purposes for the year 1942, prepared financial statements for income tax returns that included the monies received in 1942 under said contract. That said monies received under the contract for the Delta Venture was not income for any year until the said contract was completed as provided for in the contract, and accepted by the United States Government. That

said completion and acceptance was not made until February 16, 1943.

VIII.

That Daley Brothers for many years last past have been in the general contracting business, and have as a consistent practice prior to and subsequent to 1942 maintained their books and reported their income on a completed contract basis. That said practice has been approved by the Commissioner of Internal Revenue, and with the exception of the present controversy, said Commissioner has always accepted the completed contract method of accounting by Daley Brothers. That the partnership books were the general records of both the joint venture and the partnership was recognized by the Commissioner of Internal Revenue, and no change in accounting methods or permission to change the accounting system was ever approved by the Commissioner of Internal Revenue or requested by the taxpayer.

IX.

That at the end of the calendar year of 1942, an income tax return was made for the special partnership, notwithstanding the fact that the contract was not completed and accepted before December 31, 1942, and said income tax return was erroneously made and reported under the mistaken theory that the income was earned in the calendar year 1942. This income was then inadventently reported by the plaintiffs as income as to their respective

shares by the plaintiffs herein on their individual returns for said year.

X.

That in 1943, the plaintiffs discovered the error of the reporting of income from the special partnership on the Delta Venture and thereupon filed their amended returns for the years 1942 and 1943.

That thereafter and in due course, plaintiffs herein filed their claim for refund on the Official Form No. 843, United States Internal Revenue Service; hearings were held by the Technical Staff of the United States Internal Revenue Service in accordance with the provision of the law relating to income tax refund claims and the matter was submitted to the Commissioner of Internal Revenue for determination; that under date of March 21, 1952, the Commissioner of Internal Revenue mailed registered letters to each of the said claimants, the plaintiffs herein, disallowing their claims for refund.

XI.

That all proceedings in the matter of prosecuting the claims for refund were timely taken, and it is from the disallowance of the claims for refund by the Commissioner of Internal Revenue that this complaint is filed to recover the tax erroneously and illegally assessed and collected by the Collector of Internal Revenue, who is no longer in office.

XII.

That the claims for refund of the taxes erroneously paid by each of the plaintiffs are as follows:

John P. Daley	$12,424.45
Minerva B. Daley	12,415.52
Morris Daley	13,102.32
Zelma B. Daley	13,088.52
William Radtke	13,245.20
Clara Radtke	13,245.20
Homer Bosse, Trustee	261.57

Wherefore, Plaintiffs pray that they, and each of them, be awarded judgment for the amounts above stated, and for such other and further relief as to the Court may seem proper in the premises.

/s/ HARRISON W. CALL,
Attorney for Plaintiffs.

Duly verified.

[Endorsed]: Filed August 20, 1952.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint of the plaintiffs, defendant admits, alleges and denies:

I.

Defendant admits the allegations contained in paragraph numbered I of the complaint, except that defendant specifically denies that any income taxes were erroneously assessed against or collected from the plaintiffs.

II.

Defendant admits the allegations contained in paragraph numbered II of the complaint.

III.

Defendant admits the allegations contained in paragraph numbered III of the complaint.

IV.

Defendant admits the allegations contained in paragraph numbered IV of the complaint.

V.

Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph numbered V of the complaint, except the defendant admits that on June 30, 1942, a limited partnership under the name of Daley Brothers was created consisting of John P. Daley, Morris Daley, partners, and Homer Bosse, Trustee, limited partner.

VI.

Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in first paragraph numbered VI of the complaint, except defendant admits that in July, 1942, a special partnership under the name of "Daley Brothers Delta War Venture", was created consisting of Daley Brothers and William Radtke, and that in July, 1942, Daley Brothers Delta War Venture received a Government contract.

VII.

Defendant denies said contract was completed on February 16, 1943. Defendant is without information or knowledge sufficient to form a belief as to the truth of the other allegation contained in second paragraph numbered VI of the complaint.

VIII.

Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in the first two sentences of paragraph numbered VII of the complaint.

Defendant denies the allegations contained in the last two sentences of paragraph numbered VII of the compliant.

IX.

Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph numbered VIII of the complaint, except defendant admits that prior to 1942 Daley Brothers has reported their income on a completed contract basis.

X.

Defendant denies the allegations contained in paragraph numbered IX of the complaint, except defendant admits upon information and belief that an information return for the calendar year 1942 was made by the special partnership.

XI.

Defendant denies the allegations contained in paragraph numbered X of the complaint, except

defendant admits that amended returns were filed by plaintiffs. That thereafter claims for refund were submitted to the Commissioner of Internal Revenue and subsequently disallowed under date of March 21, 1952.

XII.

Defendant admits the allegations contained in paragraph numbered XI of the complaint but denies that the tax sought to be recovered was erroneously and illegally assessed or collected by the Collector of Internal Revenue.

XIII.

Defendant admits the allegations contained in paragraph numbered XII of the complaint except defendant denies that said taxes were erroneously paid by each of the plaintiffs.

Wherefore, defendant prays that this action be dismissed with costs to the defendant.

/s/ CHAUNCEY TRAMUTOLO,
United States Assorney,
Attorney for Defendant.

[Endorsed]: Filed March 5, 1953.

[Title of District Court and Cause.]

STIPULATION OF FACTS

The parties, by their respective counsel, hereby stipulate that the following facts may be taken as true, together with the exhibits which are annexed

hereto and incorporated herein as a part hereof and individually marked for identification, shall be received in evidence in this cause, subject to the right of any party to enter objections upon the grounds of immateriality and/or irrelevancy, and subject further right of any party to introduce other and further evidence not inconsistent herewith.

1. This action is based on the laws of the United States, and is for the recovery of income taxes in excess of Ten Thousand Dollars ($10,000.00) assessed and collected by a Collector of Internal Revenue for the First Collection District of California for the United States, who is not now in office as a Collector of Internal Revenue. The jurisdiction of this court is based on Title 28, United States Code, Section 1346 (a)(1)(ii).

2. The plaintiffs herein are citizens of the United States of America, and reside in the State of California within the First Collection District of California for the United States Internal Revenue Service.

3. The plaintiffs John P. Daley and Minerva B. Daley, are husband and wife; the plaintiffs Morris Daley and Zelma B. Daley, are husband and wife; the plaintiffs William Radtke and Clara Radtke, are husband and wife, and during the years involved in this proceeding have filed separate income tax returns under the community property theory as permitted by law. The plaintiff Homer Bosse, Trustee, is the Trustee of the Estates of the

children of John P. Daley and Minerva Daley, namely, J. Patrick Daley; Minerva R. Daley, James D. Daley, Kathryn F. Daley and Peter Daley, under a Trust Agreement set up in 1942 by the said John P. Daley and Minerva B. Daley, and the trustee of the Estates of the children of Morris Daley and Zelma B. Daley, namely, Morris K. Daley, Alice M. Daley and Susan R. Daley, under a trust agreement set up in 1942, and the said plaintiq Homer Bosse as Trustee of the said estates, filed income tax returns as such trustee for the years involved in this proceeding.

4. The plaintiffs John P. Daley and Morris Daley, for many years prior to 1942 were engaged in the general contracting busjness, as copartners, and operated under the firm name and style of Daley Brothers (during such period of time they kept and maintained their books on a completed job basis, and reported their income on such basis). In the year 1942 desiring to set up a trust for the benefit of their children they caused to have drawn up and under the date of June 30, 1942, each of said partners and their wives executed trust agreements identical in provisions and with the same trustee, differing only in the beneficiaries under such trust agreement. The said plaintiff named herein Homer Bosse, Trustee, was therein named trustee of said trusts, and entered upon his duties as such trustee.

5. On June 30, 1942, a limited partnership under the name of Daley Brothers was created, composed

of John P. Daley and Morris Daley, general partners, and Homer Bosse, Trustee, limited partner.

6. In July, 1942, a special partnership was created under the name of Daley Brothers Delta War Venture, composed of the members of the limited partnership, Daley Brothers, together with William Radtke. In July, 1942, Daley Brothers Delta War Venture received a contract, taken in the name of Daley Brothers, from the United States of America for the construction of Abraham Relocation Center, Delta, Utah. Said contract is entitled "Contract No. W-2195-eng-247" and is dated July 8, 1942. The contract was for the sum of $2,834,212.51 and was to be completed on or before September 6, 1942. A copy of said contract (except for the detailed specifications forming a part thereof) is attached hereto and marked Exhibit 1.

7. Said contract was supplemented and changed from time to time, and copies of supplemental agreements and changes of said contract are attached hereto and marked as follows:

Supplemental Agreement No. 1, dated September 18, 1942: Increased the amount of the contract by the sum of $362,980, and changed completion date to September 21, 1942—Exhibit 2.

Supplemental Agreement No. 2, dated October 1, 1942: Increased the amount of the contract by the sum of $2,038.77, no additional time allowed for completion—Exhibit 3.

Change Order No. 2, dated September 20, 1942: Increased the amount of the contract by the sum of $1,731, no additional time allowed for completion—Exhibit 4.

Supplemental Agreement Change No. 3, dated September 20, 1942: Increased the amount of the contract by the sum of $187,644.86, and extended the time for completion to October 6, 1942—Exhibit 5.

Change Order No. 4, dated October 3, 1942: Increased the amount of the contract by the sum of $1,988, no additional time allowed for completion—Exhibit 6.

Change Order No. 5, dated October 4, 1942: Increased the amount of the contract by the sum of $91,213.89, no additional time allowed for completion—Exhibit 7.

Supplemental Agreement Change No. 6, dated October 5, 1942: Increased the amount of the contract by the sum of $76,125, extended the completion date sixty days to December 5, 1942—Exhibit 8.

Change Order No. 7, dated December 1, 1942: Decreased the amount of the contract by $57,482.94, no additional time allowed for completion—Exhibit 9.

Change Order No. 8, dated December 1, 1942: Increased the amount of the contract by the sum of $61,741.71, no additional time allowed for completion—Exhibit 10.

Change Order No. 9, dated December 4, 1942: Increased the amount of the contract by the sum of $83,344.66, no additional time allowed for completion—Exhibit 11.

Change Order No. 10, dated December 5, 1942: No increase in the amount of the contract, but extended the time for completion seventy-three days to February 16, 1943—Exhibit 12.

Change Order No. 11, dated February 4, 1943: Increased the amount of the contract by the sum of $5,630.79, no additional time allowed for completion—Exhibit 13.

Supplemental Agreement—Modification No. 13: dated February 15, 1943: Increased the amount of the contract by the sum of $2,090.85, no additional time allowed as a result of this agreement—Exhibit 14.

8. By virtue of said supplemental agreements and change orders, the amount of the contract price was increased from $2,834,212.51 to $3,653,259.12, and the completion date of said contract was extended from September 6, 1942, to February 16, 1943.

9. The contract was completed and the work accepted as satisfactory on behalf of the United States of America on February 16, 1943. A summary of United States vouchers issued in payment of the work performed under the contract is attached hereto and marked Exhibit 15.

10. A copy of data required in connection with

renegotiation of assigned contracts, dated January 26, 1943, submitted by Daley Brothers to the Price Adjustment Section, Pacific Division of the United States Engineer Department, relating to said contract and other contracts, is attached hereto as Exhibit 16.

11. A copy of a letter, dated February 5, 1943, from Daley Brothers to United States Engineers, Pacific Division, San Francisco Branch, is attached hereto as Exhibit 17.

12. Daley Brothers Delta War Venture filed a partnership return of income for the year 1942, reporting net income of $206,250.44, showing a distribution as follows:

Daley Brothers, limited partnership	$144,166.96
William Radtke	62,083.48
Total	$206,250.44

A copy thereof is attached hereto as Exhibit 18. Daley Brothers Delta War Venture filed an amended partnership return of income for the year 1942 reporting no net income—Exhibit 19. Daley Brothers Delta War Venture filed an amended partnership return of income for the year 1943 reporting net income of $171,124.44—Exhibit 20.

13. John Daley filed, on March 15, 1943, an individual income tax return for the year 1942. Minerva Daley filed, on March 15, 1943, an individual income tax return for the year 1942. Included as part of the gross income reported on each return was $23,819.85, which constituted one-

half of the distributive share of John Daley from Daley Brothers, limited partnership.

14. Morris Daley filed, on March 15, 1943, an individual income tax return for the year 1942. Zelma Daley filed, on March 15, 1943, an individual income tax return for the year 1942. Included as part of the gross income reported on each return was $23,819.85, which constituted one-half of the distributive share of Morris Daley from Daley Brothers, limited partnership.

15. William Radtke filed, on March 15, 1943, an individual income tax return for the year 1942. Included as part of the gross income reported was his distributive share of the Daley Brothers Delta War Venture in the amount of $62,083.48. Clara Radtke filed, on March 15, 1943, an individual income tax return for the year 1942, reporting one-half of the income reported by William Radtke.

16. Copies of the claims for refund filed by plaintiffs for 1943 are attached hereto as follows:

John P. Daley—Ex. 21.
John P. Daley (Amended Claim)—Ex. 22.
Minerva B. Daley—Ex. 23.
Minerva B. Daley (Amended Claim)—Ex. 24.
Morris Daley—Ex. 25.
Morris Daley (Amended Claim)—Ex. 26.
Zelma B. Daley—Ex. 27.
Zelma B. Daley (Amended Claim)—Ex. 28.
William Radtke—Ex. 29.
Clara Radtke—Ex. 30.
Morris K. Daley Trust, Homer R. Bosse, Trustee—Ex. 31.

Alice M. Daley Trust, Homer R. Bosse, Trustee —Ex. 32.

Susan R. Daley Trust, Homer R. Bosse, Trustee —Ex. 33.

J. Patrick Daley Trust, Homer R. Bosse, Trustee —Ex. 34.

Minerva R. Daley Trust, Homer R. Bosse, Trustee —Ex. 35.

James W. Daley Trust, Homer R. Bosse, Trustee —Ex. 36.

Kathryn F. Daley Trust, Homer R. Bosse, Trustee—Ex. 37.

Peter D. Daley Trust, Homer R. Bosse, Trustee —Ex. 38.

LLOYD H. BURKE,
United States Attorney,

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for Defendant.

/s/ HARRISON W. CALL,
Attorney for Plaintiffs.

EXHIBIT No. 1

U. S. Standard Form No. 23—Rev.
Approved by the Secretary of the Treasury
Revised November 7, 1941

Chief of Engineers

Contract

(Construction)

Daley Brothers,
425 Bryant Street,
San Francisco, California,
(Contractor.)

War (Corps. of Engineers),
(Department.)

Contract for Construction of Abraham Relocation Center: Amount, $2,834,212.51.

Place: Delta, Utah.

Payment to be Made by the Finance Office, U. S. Army, Fort Douglas, Utah.

Sureties: See Page 2f.

Procurement Authority: The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following Procurement Authority, the available balance of which is sufficient to cover the cost of same: Eng. 32231 P227-99 A0905-23.

Statutory Authority: Title II of the First War Powers Act, 1941, Act of December 18, 1941 (Public Law 354—77th Cong.), and Executive Order No. 9001, dated December 27, 1941.

/s/ WAYNE G. BROWN,
Captain, Corps of Engineers,
Executive Assistant.

Contract for Construction

This Contract, entered into this 8th day of July, 1942, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Daley Brothers, a partnership consisting of John P. Daley and Morris Daley, of the city of San Francisco, in the State of California, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work—The contractor shall furnish the materials, and perform the work for the construction and completion of the Abraham Relocation Center at Delta, Utah, in strict accordance with negotiations, with plans and specifications pertaining thereto, and with the terms of his proposal dated July 8, 1942. Contract proposal is attached hereto as Schedule "A" and made a part of this contract.

Any discrepancies existing between Specification No. 6 attached hereto and made part of this contract, and contractor's proposal dated July 8, 1942,

will be adjusted by negotiations and/or change orders at a later date for the consideration of Two Million Eight Hundred Thirty-four Thousand Two Hundred Twelve Dollars and Fifty-one Cents ($2,834,212.51) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification No. 6. Drawings Nos. AR 2-1 to AR 2-10, inclusive, AR 2-16a, AR 2-17 to AR 2-51, inclusive, 800-1021, to 800-1024, inclusive, 655-116, 100-8, and 100-20.

The work shall be commenced within one (1) calendar day after date after date of notice to proceed, and shall be completed within sixty (60) calendar days after date of such notice, to wit: on or before September 6, 1942. Contractor shall pay to the Government liquidated damages in the amount of One Hundred Dollars ($100.00) per each calendar day of delay of completion of the contract. Certified true copy of Notice to Proceed, with acknowledgment of receipt thereof dated July 8, 1942, is attached as page 9 and made a part of this contract.

Contract W-2195-eng-247

Schedule "A"
Contract W-2195-eng-247
Dated July 8, 1942

Daley Brothers
General Contractors
426 Bryant Street
San Francisco, California
Salt Lake City, Utah
July 8, 1942

Telephone: EXbrook 7865

John P. Daley—Morris Daley.

U. S. Engineers,
District Engineer,
Salt Lake District
Salt Lake City, Utah.

Dear Sir:

We propose to furnish all labor and material necessary in the erection the Abraham Relocation Center, in accordance with preliminary plans and notes below, for the sums shown opposite the various items.

General Notes

Materials. U. S. Engineers will furnish at no cost to the contractor, FOB Delta, all necessary cement, electric wire, electric poles for major distribution, and the three large transformers. Lumber will be allocated by the Engineers, to be included

in the estimate at $47 per thousand, FOB Delta. Local gravel will be used for concrete.

Work Included. Only work shown below has been figured. This includes all buildings; water system excluding wells, pumps, water tower, tanks, and connections; power system excluding sump pump house pumps and disposal system beyond this pump house; electrical distribution system within the housing area, including the sub station, but excluding the service from Delta to the site.

Work Not Included. Since the market is critical, and since materials not immediately needed may be purchased later by the Engineers equally well, with possible freight saving, we suggest that those items to be installed by the Japanese be not furnished at this time by the contractor. Items of fence wire and posts, and plaster board not to be installed have been left out. The hospital has not been figured.

Roofs. In the Administration Area, roofs are to be split sheef as below. In all cases of wide buildings where the upper roof is flat, split sheet roofing will be substituted for the flat portion. In all other areas, roof is to be 15# felt with 55# split sheet mopped on.

Walls. In the Administration Area, walls are to be ½" celotex with painted joint rustic. Warehouses are to have wood sheathing on walls with 45# paper and lath. All other walls are to be ¾" insulation board with lath nailed at joints.

Framing. Buildings with wood floors are to have footings 4 x 12 x 18 or 12 as shown; girders 6 x 6 outside and 4 x 6 inside, 8' span; joists are 2 x 6, not over 10' span; floors are common sheathing covered with Masonite; studs are 2' centers; rafters and ties are 4' centers. Roof insulation will be ½" celotex laid on outside of roof sheathing.

Floors: There will be concrete floors in all mess halls, baths, warehouses, and shops, and fire house. All others are wood.

Lining. All buildings in the Japanese area used for recreation and apartments have no wall lining. Mess halls and baths in this area have partitions and walls covered with plaster board to roof. In other sections, all walls and partitions except in warehouses, shops, and rough buildings so shown, are lined with plaster board.

Water System. Install water system in accordance with our layout submitted herewith, using spiral weld and steel pipe as available, coated, welded or screwed joints. All materials new.

Sewer System. Complete system as shown, to but not including sump.

Plumbing. All water closets Plate P 1, except 6 gal. VC tank. Urinals P 2, with S U flush valves. Service Sinks, P 5. Lavatories P 14, 18 x 15, VC wall. Showers P 19. Baths P 17, 4'6" leg tubs. Wash trays P 18. Drinking Fountains P 20, VC. Water Heaters, Japanese Baths, 14 x 4 EH black steel storage tank with manhole, set on brick sup-

ports, with temp. and pressure relief valves and angle thermometers. #1030 Ideal Hitest CI Water heater, coal fired, with damper regulator. Connect with HW tank with 4" galvanized flow and returns. Valves 9" breeching. Tank and boiler covered with 6 ply air cell asbestos Water heaters in mess halls, 65 gal EH range boilers, galv. on stands. "210 Home type CI water heater. Tanks with temp. and pressure relief valves. Covering same as baths. Sinks in Mess Halls, 3—3 compartment 24 x 30 x 12, 6 g galv. flat rim scullery sinks, less backs Gladding McBean TC Grease interceptors. Hot & cold water galv. steel with mall. fittings. Soil pipe, standard or Victory grade. Vent each main run at end of run, and each end of branch run. Floor drains, #109. The following buildings have 30 G heaters and tanks: 4, 5, 8, 9, 10 (2), 17, 20, 21, 25, 30. The following buildings have 65 G tanks and heaters: 12, 13, 15, 18, 23, 35. Building #3 has 1300 G tank and heater. Building 24 has 370 G tank and heater. Valves: 2" and smaller, brass gate 125# pressure. 2½ and larger, CI body, gate valve 125#. Each building valved, and each branch main or group of fixtures valved. Covering: All hot water and cold water pipe covered as called for in P 30 and spec. 8000 E.

Roads—Roads for housing, Administration, M.P., and Hospital areas are included. Existing County roads are not included. Secondary roads are as shown, using local gravel, compacted. Primary roads are as shown, using local gravel base, and 2" road mix top. Coal storage area is not paved.

Refrigerated Warehouse—Refrigerated warehouse has been re-designed, with 6" insulated floors, walls, and ceilings, using redwood bark; standard type refrigerator doors; two compressors of proper capacity and sufficient evaporators to maintain 40 degrees inside temperature with 100 degrees outside, 16 hours running time.

	Item	No. Items	Price Each	Total
1	Japanese Quarters	432	$ 2,812.85	$1,215,151.20
2	Japanese Mess Hall	36	6,071.11	218,559.96
3	Japanese Bath House	36	17,023.55	612,847.80
4	Japanese Recreation	36	3,093.63	111,370.68
5	Administration Area Adm. Bldg.	2	6,636.71	13,273.42
6	Administration Warehouse	1	2,208.87	2,208.87
7	Administration Garage	1	3,498.64	3,498.64
8	Administration Shop	1	5,633.78	5,633.78
9	Administration Post Office	1	5,737.81	5,737.81
10	Administration Post Exchange	1	5,444.91	5,444.91
11	Administration Fire Station	1	5,931.73	5,931.73
12	Administration Dormitory	4	4,626.81	18,507.24
13	Administration Mess Hall	1	4,325.83	4,325.83
14	Administration Recreation	1	3,414.81	3,414.81
15	M.P. Area, Officers' Quarters	1	2,982.53	2,982.53
16	Barracks	4	2,989.60	11,958.40
17	M.P. Headquarters	1	3,858.20	3,858.20
18	Guard House	1	5,217.66	5,217.66
19	Deleted		—None—	
20	M.P. Post Exchange	1	3,959.20	3,959.20
21	M.P. Dispensary	1	1,628.12	1,628.12
22	M.P. Garage	1	2,593.68	2,593.68
23	M.P. Mess Hall	1	3,867.29	3,867.29
24	Warehouse Lavatory	1	753.46	753.46
25	M.P. Lavatory	1	4,712.66	4,712.66
26	Warehouse, 40x100	20	3,100.70	62,014.00
27	Warehouse, Refrigerated, 40x100	1	14,786.40	14,786.40
28	Substation		—None—	
29	Coal Storage		—None—	
30	Visitors' Building	1	3,290.58	3,290.58

	Item	No. Items	Price Each	Total
31	Pump House, Sewer			—None—
32	Elevated Water Storage			—None—
33	Sentry House	3	151.50	454.50
34	Watch Tower	4	2,248.26	8,993.04
35	Deleted			—None—
36	Deleted			—None—
37 to 51, Inclusive				—None—
52	Engineers Office	1	3,600.65	3,600.65
53	Water System			178,429.68
54	Sewer System			108,962.84
55	Electric Service			55,923.70
56	Roads			120,319.29
	Total			$2,834,212.51

We estimate that the Hospital Group might cost approximately $375,000.00.

We trust that this figure meets with your approval.

Yours very truly,

DALEY BROTHERS,

/s/ JOHN P. DALEY.

Sureties

Columbia Casualty Company, a New York corporation. Principal Office: New York, New York.

Great American Indemnity Company, a New York corporation. Principal Office: New York, New York.

Fidelity and Deposit Company of Maryland, a Maryland corporation. Principal Office: Baltimore, Maryland.

Glens Falls Indemnity Company, a New York corporation. Principal Office: Glens Falls, New York.

New Amsterdam Casualty Company, a New York corporation. Principal Office: Baltimore, Maryland.

National Surety Corporation, a New York corporation. Principal Office: New York, New York.

Massachusetts Bonding and Insurance Company, a Massachusetts corporation. Principal Office: Boston, Massachusetts.

The Fidelity and Casualty Company of New York, a New York corporation. Principal Office: New York, New York.

Fireman's Fund Indemnity Company, a California corporation. Principal Office: San Francisco, California.

Maryland Casualty Company, a Maryland corporation. Principal Office: Baltimore, Maryland.

The Aetna Casualty and Surety Company, a Connecticut corporation. Principal Office: Hartford, Connecticut.

The Travelers Indemnity Company, a Connecticut corporation. Principal Office: Hartford, Connecticut.

[Construction Contract]

S. Standard Form No. 23 (Revised November 7, 1941.)

Article 2. Specifications and drawings—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything

mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

Article 3. Changes—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settle-

ment of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 5. Extras—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the rejected material from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said article 9 for terminations thereunder.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and per-

formance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific require-

ments of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship or final acceptance as a whole or in part shall be made at the site.

Article 7. Materials and workmanship—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may re-

quire the contractor to remove from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment on the work is deemed by the contracting officer to be contrary to the public interest.

Article 8. Superintendence by contractor—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the con-

tractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact

thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 10. Permits and responsibility for work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 11. Eight-hour law—Overtime compensation—Convict labor—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be

computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government. Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code 1934 ed., title 40, sections 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of section 303 of the act of September 9, 1940, 54 Stat. 884, relating to compensation for overtime.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12—Covenant against contingent fees—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such

commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fullfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Rate of wages—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, 1934 ed., title 40, secs. 276a and 276a-1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may

be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

Article 18. Domestic preference.—In the performance of the work covered by this contract the

contractor, subcontractor, material men or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Stat. 1520 (U. S. Code, 1934 ed., title 41, sec. 10b).

Article 10. Nonrebate.—(a) The contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of each and every weekly pay roll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Register of March 1, 1941, 6 F.R. 1211, or any modification thereof pursuant to the act of June 13, 1934,

48 Stat. 948 (U. S. Code, 1934 ed., title 40, sections 276b and 276c), sworn to by the contractor or the subcontractor concerned or by the authorized officer or employee of the contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the contractor or such subcontractor from the full weekly wages earned as set out on such pay roll; and that no deductions, other than permissible deductions as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly, from the full weekly wages earned as set out on such pay roll.

(b) The contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this article of the contract shall be subject to all applicable provisions of such regulations.

(c) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fullfillment of the requirements of this article.

Article 20. Additional security.—Should any surety upon any bond furnished in connection with this contract become unacceptable to the Government, or if any such surety shall fail to furnish re-

ports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government or of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 21. Definitions—(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

Article 22. Alterations—The following changes were made in this contract before it was signed by the parties hereto:

Article 3. Changes. The following langauge is deleted: "No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative."

Article 9. Delays—Damages. After the words "Provided, that the right of the contractor to proceed shall not be terminated," the following is added and made a part of the contract: "under this arti-

cle." After the words "acts of the Government," the following is added and made a part of the contract: "(including but not restricted to any preference, priority or allocation order)."

Article 17. Rate of Wages. The following subarticle is added and made a part of this contract: "(c) The regulations of the Secretary of Labor, referred to in Article 19 hereof, allow certain 'permissable deductions' from the wages required by this article to be paid."

Article 18. Domestic Preference. Deleted in accordance with Circular Letter No. 1442 dated March 30, 1942.

Article 19. Nonrebate. Deleted in accordance with Procurement Regulation 14-T dated April 30, 1942. Revised Article 19 added on page 6Aa and made a part of this contract.

Article 23. Patents. Added on page 6a, and made a part hereof.

Article 24. Assignment of Claims. Added on page 6a and made a part hereof.

Article 25. Safety and Health Requirements. Added on page 6a and made a part hereof.

Article 26. Notice by Wire to Government Consignees. Added on page 6a and made a part hereof.

Article 27. Anti-Discrimination. Added on pages 6a and 6b and made a part hereof.

Article 28. Added on page 6b and made a part hereof.

Article 29. Termination for Convenience of the Government. Added on pages 6b, 6c, and 6d and made a part hereof.

Article 30. Added on page 6e and made a part hereof.

Article 31. Added on page 6e and made a part hereof.

Article 32. Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. Added on pages 6f and 6g and made a part hereof.

Certificate of Non-employment of Government Employees added as page 6a and made a part hereof.

Bond Data Sheet added as page 6i and made a part hereof.

Article 19. Nonrebate of wages. The contractor shall comply with the regulations of the Secretary of Labor pursuant to the act of June 13, 1934, 48 Stat., 948 (U. S. Code, title 40, secs. 276b and 276c), and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements thereof.

Article 23. Patents—The contractor shall hold and save the Government, its officers, agents, servants and employees, harmless from liability of any nature or kind, including costs and expenses for or on account of any patented or unpatented invention, article, or appliance manufactured or used in the performance of this contract.

Article 24. Assignment of Claims—(a) Any assignment shall cover all amounts payable under this contract and not already paid and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(b) Any claim under this contract which may be assigned may be subject to further assignment to a bank, trust company, or other financing institution, including any Federal lending agency, and to similar further assignment, provided that any such assignee shall file written notice of the further assignment together with a true copy of the instrument of further assignment with the contractor and also as provided in proviso 4 of section 1 of the Assignment of Claims Act of 1940, (Public No. 811, 76th Congress) in respect of original assignment.

(c) No assignee shall divulge any information concering the contract, or contained herein, except to those persons necessarily concerned with the transaction.

(d) Payments to an assignee of any claim arising under this contract shall not be subject to re-

duction or set-off for any indebtedness of the assignor to the United States arising independently of this contract.

Article 25. Safety and Health Requirements—"In the performance of this contract the contractor will comply with all pertinent provisions of the Safety Requirements for Excavation, Building and Construction, Construction Division, Q.Q.M.G., approved by the Chief of the Construction Division, March 1, 1941, and will furnish and cause to be used such additional safeguards, safety devices and protective equipment as the contracting officer may determine to be reasonably necessary to protect the life and health of its employees. The contractor will maintain an accurate record of, and will report to the Contracting Officer, all accidents arising out of, and in the course of employment on work under this contract resulting in death, occupational disease, or injury requiring medical attention or causing loss of time from work. Nothing in this article shall be construed to relieve the Contractor from compliance with applicable State and Local Safety, Health and Sanitation Laws."

Article 26. Notice by Wire to Government Consignees—In connection with any shipment hereunder of one carload or equivalent or more consigned to any unit or officer of the War Department, the shipper, at the time equipment is ordered for loading for rail, motor or water transport, will send consignee notice thereof by prepaid telegraph or teletype, including date, route, size, and brief gen-

eral description of shipment. This provision is not to be substituted for any other requirement, such as mailing bills of lading."

Article 27. Anti-Discrimination

(a) The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color or national origin.

(b) The Contractor agrees that the provisions of paragraph (a) above will also be inserted in all of his subcontracts. For the purpose of this article a subcontract is defined as any contract entered into by the contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or legal entity, which involves performance, wholly or in part at the site of the work or some part of the work to be performed under this contract.

Article 28. It is expressly understood and agreed that the Contractor shall not be liable for damage to or destruction of the work or any part of the work covered by this contract resulting from enemy operations. In the event the work covered by this contract is damaged due to enemy operations, the Contractor shall, if so ordered by the Contracting Officer, repair such damage under a change order stipulating the additional sum to be added to the Contract price and the additional time for performance. In the event the work covered by this contract is destroyed or damaged due to enemy operations

and the Government determines not to replace or repair such work, the Contractor shall be paid all costs reasonably incurred in connection with the prosecution of the work.

Article 29. Termination for Convenience of the Government.

"(a) The Government may terminate this contract in whole or in part at any time by a notice in writing from the Contracting Officer to the Contractor, specifying the date upon which such termination shall become effective and the extent to which the performance of such contract shall be terminated. Termination shall be effective upon the date and to the extent specified in said notice.

"(b) Upon receipt of the notice of termination, the Contractor shall, except insofar as the notice directs otherwise with respect to this contract, or in the event of partial termination, with respect to the part thereof covered by the notice:

"(1) Discontinue all work and the placing of all orders for materials and facilities otherwise required for the performance thereof;

"(2) Cancel all existing orders and subcontracts to the extent such orders and subcontracts are chargeable to the performance thereof;

"(3) Transfer to the Government, in accordance with the directions of the Contracting Officer, all materials, supplies, work in process, facilities, equipment, machinery or tools acquired by the Con-

tractor in connection with the performance thereof, and all plans, drawings, working drawings, sketches, specifications and information for use in connection therewith; provided that the Contractor may retain any such equipment, machinery and tools if he so elects, and will forego reimbursement thereon.

"(4) Take such action as may be necessary to secure to the Government the benefits of any rights remaining in the Contract under orders or subcontracts chargeable thereto to the extent that such orders or subcontracts are so chargeable;

"(5) Take such action as the Contracting Officer may prescribe for the protection and preservation of all property in the possession or control of the Contractor, title to which is tranferable to the Government under the provisions of this article.

Should notice of termination cover only a portion of this contract, the Contractor will proceed to completion of such portions as are not terminated.

"(c) Upon compliance by the Contractor with the above provisions of this Article and subject to deductions for payments previously made, the Government shall compensate the Contractor as follows:

"(1) By reimbursing the Contractor for all actual expenditures certified by the Contracting Officer as having been made with respect to this contract, including expenditures made in connection with any portions of the contract which may have been completed prior to termination, as well as expenditures made after termination in completing those por-

tions of the contract which the Contractor may have been required by the notice of termination to complete.

"(2) By reimbursing the Contractor for all expenditures made with the prior written approval of the Contracting Officer in settling or discharging any outstanding contractual obligations or commitments incurred or entered into by the Contractor with respect to this contract;

"(3) By paying the Contractor, as a profit on his contract, insofar as a profit is realized hereunder, an amount to be computed by the Contracting Officer in the following manner:

"(A) Estimate the profit which would have been realized on this contract if the contract has been complete and labor and material costs prevailing at the date of terminations has remained in effect.

"(B) Estimate, from a consideration of all relevant factors, the percentage of completion of the contract including any work performed after termination. In estimating the percentage of completion, the Contracting Officer shall estimate the percentage of the total work required by the contract which the work actually accomplished represents.

"(c) Multiply the profit determined under (A) by the percentage determined under (B). The Product is the amount to be paid the Contractor as profit.

"(d) Subject to the approval of the Contracting Officer, the Government will reimburse the Contractor for expenditures made and costs incurred after the date of termination for the protection of Government property and for such further expenditures and costs as may be necessary in connection with the settlement of this contract.

"(e) The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claim for labor or material and to any claim which the Government may have against the Contractor under or in connection with this contract, and payments under this article shall be subject to reasonable deductions by the Contracting Officer on account of defects in materials or workmanship.

"(f) The sum of all amounts payable under this Article, plus the sum of all amounts previously paid under this contract, shall not exceed the total contract price, adjusted in the event that this contract contains an article providing for price adjustment, on the basis of the estimate of the Contracting Officer, to the extent which would have been required by such article if this contract had been completed and labor and material costs prevailing at the date of termination had remained in effect.

"(g) Should the above provisions of this Article not result in payment by the Contractor of at least $100, then that amount shall be paid to the Contractor in lieu of any and all payments hereinbefore provided for in this Article.

"(h) Any disputes arising out of termination under this Article shall be decided in accordance with the procedure prescribed in Article 15 of this contract.

"(i) Upon the making of the payments called for by this Article, all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the Articles, if any, of this contract applicable to patent infringements and reproduction rights will remain in full force and effect.

Article 30. The Contractor will prosecute the work in accordance with the following conditions and will include the same provisions in all subcontracts entered into by him: "Overtime rates, where a single shift is worked, eight (8) hours of continuous employment except for lunch periods shall constitute a day's work beginning on Monday and through Friday of each week. When work is required in excess of eight (8) hours on any one day or during the interval from 5:00 p.m. Friday to 7:00 a.m. Monday, or on holidays, such work shall be paid for at one and one-half (1½) times the basic rate of wages. "Shifts, where two or more shifts are worked, five days of 7½ hour shifts from Sunday midnight to Friday midnight, shall constitute a regular week's work. The pay for a full shift period shall be a sum equivalent to eight (8) times the basic hourly rate and for a period less than the

full shift shall be the corresponding proportional amount which the time worked bears to the time allocated to the full shift period. Any time worked from Friday midnight to Sunday midnight or in excess of regular shift hours shall be paid for at one and one-half (1½) times the basic rate of wages. Wherever found to be practicable, shifts should be rotated."

Article 31. Unless otherwise indicated, the prices herein include any federal, state and local tax or charge heretofore imposed which is applicable to the supplies or work covered hereby. If after the date of the award, the Federal Government or any state or local government shall impose, remove, or change any duty, sales, use or excise tax, or any other tax or charge directly applicable to the supplies or work covered hereby or the materials used in the manufacture thereof or directly upon the importation, production, processing, manufacture, construction or sale of such supplies, work, or materials, which tax or charge must be borne by the contractor because of a specific contractual obligation or by operation of law, or, in case of a decrease or elimination of tax, where the contractor is relieved to that extent, and if in case of an increase in an existing tax or the imposition of a new tax the contractor has paid such tax or charge to the Federal Government or a state or local government, or any person, then the prices named herein will be increased or decreased accordingly and any amount due to the contractor as a result of such change will

be charged to the Government and entered on vouchers (or invoices) as a separate item: Provided, however, that the Government reserves the right to issue to the contractor in lieu of such payment a tax exemption certificate or certificates acceptable to the Federal Government or state or local government, as the case may be, and the contractor agrees, in the case of any such state or local tax or charge, to take such steps as may be requested by the Government to cause such tax or charge to be paid under protest, to preserve and to cause to be assigned to the Government any and all rights to the refund of such tax or charge, and to furnish to the Government all reasonable assistance and cooperation requested by the Government in any litigation or proceeding for the recovery of such tax or charge: and Provided further, That nothing contained herein shall be construed as requiring the Government to reimburse the contractor for any Federal, state or local income taxes, income surtaxes or excess profits taxes.

Note

Following pages are
on Card 3:

63	87	92
64	88	
65	89	
86	90	

Contract #W-2195-eng-247

Bond Data Sheet.

Date July 8, 1942

Office of the Under Secretary of War,
Purchase and Contract Branch,
Insurance Section,
Washington, D. C.

Name of Principal—Daley Brothers.

Name of Project—Construction of Abraham Relocation Center.

Location of Project—Delta, Utah.

Amount of Contract—$2,834,212.51.

Penalty of Bond—Performance $283,421.25—Payment $1,417,106.26.

Type of Bond—Performance Bond and Payment Bond.

Name of Surety—Columbia Casualty Company, Great American Indemnity Company, Fidelity and Deposit Company of Maryland, Glens Falls Indemnity Company, New Amsterdam Casualty Company, National Surety Corporation, Massachusetts Bonding and Insurance Company, The Fidelity and Casualty Company of New York, Fireman's Fund Indemnity Company, Maryland Casualty Company, The Aetna Casualty and Surety Company, The Travelers Indemnity Company.

Bond Number—Both Bonds #43702

Effective Date of Bond—July 8, 1942.

Premium Charged—$22,563.41 for both bonds.

Type of Premium per Thousand—$8.00/M first $2,500,000.00 of the contract price, $7.67/M next $334,212.51 of the contract price.

OFFICE OF DISTRICT ENGINEER,
SALT LAKE CITY DISTRICT,
SALT LAKE CITY, UTAH

By /s/ WAYNE G. BROWN,
Captain, Corps of Engineers,
Executive Assistant.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,

By /s/ MERWIN R. SMITH,
Major, Corps of Engineers,
District Operations Officer.

DALEY BROTHERS,
Contractor.

By /s/ JOHN P. DALEY,
Partner, San Francisco,
California.

Two witnesses:

/s/ HARRY W. STRICK

/s/ KAY DICKSON

Directions for Preparation of Contract

1. This form shall be used for every formal contract, except contracts on a cost-plus basis, for the construction repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, required or authorized by law, or as authorized by the Director of Procurement. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of those made shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

3. The blank space of article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on patents, the Invitation to Bidders shall so state and the following article be used:

Article ..... Patents—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind, including costs and expenses, for

or on account of any patented or unpatented invention, article, or appliance manufactured or used in the performance of this contract, including their use by the Government.

Where any patent or patents are to be excepted from the operation of this article, such exceptions will be specifically stated, by reference to the patent number, date of issue and name of patentee, in a proviso to be added to the article.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of article 16, "Payments to Contractor," must be stricken out.

6. If approval of the contract is required before it shall become binding, the following article must be added:

Article ..... Approval—This contract shall be subject to the written approval of .... and shall not be binding until so approved.

Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation

of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed

with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract, or equivalent information must be furnished elsewhere in the contract.

13. The Invitation, Bid, Acceptance, and Instructions to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in article 9 of the contract. If time is not of the essence of the contract the words "No liquidated damages" or an equivalent phrase should be inserted on the reverse side of Standard Form No. 20. So much of the language in article 9 as relates to liquidated damages shall then be deleted.

15. Additional contract provisions and instructions, deemed necessary for the particular work, not inconsistent with the standard forms nor involving questions of policy, may be incorporated in the specifications or other accompanying papers.

CE 161 (Abraham Relocation Center) OP
Contract W-2195-eng-247

July 8, 1942.

Daley Brothers,
426 Bryant Street,
San Francisco, California.

Gentlemen:

In accordance with the terms of your informal bid and with negotiations with this office, you are hereby awarded the contract for the construction and completion of the Abraham Relocation Center at Delta, Utah.

Contract No. W-2195-eng-247 in the amount of $2,834,212.51 is being prepared on U. S. Standard Form No. 23 and will be forwarded for your signature as soon as practicable after receipt of your acknowledgment of letter of award. At the same time, Performance and Payment Bond forms will be forwarded to you for execution. Contract is based on the following:

Items 1 to 56, inclusive, of your proposal, for the sum of $2,834,212.51.

This is your formal notice to proceed with the work as shown above. The performance time of your contract starts on the date of acknowledgment of receipt of this letter. Likewise, actual work will commence within one (1) calendar day after acknowledgment of receipt of award, and shall be completed within sixty (60) calendar days, to wit: on or before September 6, 1942.

Very truly yours,

/s/ MERWIN H. SMITH,
Major, Corps of Engineers.

A True Copy.

/s/ WAYNE G. BROWN,
Captain, Corps of Engineers.

To: The District Engineer, Salt Lake City District,
Salt Lake City, Utah.

The above Notice to Proceed was received this 8th day of July, 1942.

DALEY BROTHERS,

By /s/ JOHN P. DALEY.

EXHIBIT No. 11

War Department
Office of the District Engineer
Salt Lake City District
32 Exchange Place
Salt Lake City, Utah

Refer to File No. CE 161 (Abraham Relocation Center) OP

Contract W-2195-eng-247.
Change No. 9,
(Change Order),
December 4, 1942.

Daley Brothers,
126 Bryant Street,
San Francisco, California.

Gentlemen:

Reference is made to Article 3 of your contract number W-2195-eng-247, dated July 8, 1942, for construction of Abraham Relocation Center, Delta, Utah.

It has been determined in view of the fact that certain conditions have arisen which have necessitated changes in the above contract, it is necessary and in the best interest of the United States to modify said contract in certain particulars as follows:

For payment of allocated lumber purchased in excess of the amount provided for in the contract, as follows:

	Increase	Decrease
Total amount of lumber purchased by Daley Bros.	$555,392.73	
Amount set up in contract for purchase of allocated lumber		$472,048.07
Total increase in contract amount	$83,344.66	

It is understood and agreed that on account of the foregoing modification of said contract, additional time will not be allowed.

It is further understood and agreed that all other terms and conditions of said contract as modified by Supplemental Agreements Nos. 1 and 2,

Change Orders Nos. 2, 3, and 4, and Change Nos. 5 to 8, inclusive, shall be and remain the same.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authority ENG 32231 P227-10 A0905-23, the available balance of which is sufficient to cover cost of same.

Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space provided below.

Original Contract Amount	$2,834,212.51
Supplemental Agreements Nos. 1 & 2	365,018.77
Change Nos. 2 to 8	326,961.54
Change No. 9 (Increase)	83,344.66
Revised Total Amount of Contract	$3,645,537.82

Very truly yours,

/s/ MERWIN H. SMITH,
Major, Corps of Engineers.

The foregoing modification of said contract is hereby accepted this 4th day of December, 1942.

DALEY BROTHERS,

By /s/ JOHN P. DALEY,
Partner.

EXHIBIT No. 12

War Department
Office of the District Engineer
Salt Lake City District
32 Exchange Place
Salt Lake City, Utah

Refer to File
No. CE 161 (Abraham Relocation Center) OP

Contract W-2195-eng-247
Modification No. 10
(Change Order)
December 5, 1942

Daley Brothers
426 Bryant Street
San Francisco, California

Gentlemen:

Reference is made to Article 9 of your contract number W-2195-eng-247, dated July 8, 1942, for construction of Abraham Relocation Center, Delta, Utah.

It has been determined, in view of the fact that the contractor was delayed seventy-three (73) calendar days in completion of the project due to the operation of the Priority System, it is necessary and in the best interest of the United States to modify said contract in certain particulars as follows:

To provide for an extension of seventy-three (73) calendar days on contract W-2195-eng-247, making the revised completion date February 16, 1943.

It is understood and agreed that all other terms and conditions of said contract as it heretofore may have been modified shall be and remain the same.

Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space provided below.

Very truly yours,

/s/ MERWIN R. SMITH,
Major, Corps of Engineers.

The foregoing modification of said contract is hereby accepted this 5th day of December, 1942.

DALEY BROTHERS,

By /s/ JOHN P. DALEY,
Partner.

EXHIBIT No. 15

Summary of Vouchers

Voucher No.	Based on Estimate for Period Ending	Amount of Contract Completed	Total Holdback*	Previous Payments	Amount Paid on Voucher	Date of Voucher
17271	7/26/42	$ 105,953.45	$ 16,595.35	None	$ 149,358.10	8/ 6/42
22816	8/13/42	857,963.98	85,796.40	$ 149,358.10	622,809.48	8/26/42
33102	8/29/42	1,845,995.69	184,599.57	772,167.58	889,228.54	9/10/42
29229	9/14/42	2,238,839.72	224,683.97	1,661,396.12	352,759.63	9/25/42
35621	9/25/42	2,631,534.61	263,553.46	2,014,155.75	353,825.40	10/12/42
38976	10/10/42	3,029,749.04	304,874.90	2,367,981.15	356,892.99	10/21/42
47271	10/25/42	3,115,509.07	314,950.91	2,724,874.14	75,684.02	11/ 7/42
59323	11/10/42	3,157,006.71	320,700.67	2,800,558.16	35,747.88	11/27/42
64224	12/ 1/42	3,353,828.39	173,291.42	2,836,306.04	344,230.93	12/17/42
100481	2/14/43	3,552,265.48	184,894.76	3,180,536.97	186,833.75	3/ 9/43
123128	2/16/43	3,645,537.48	7,825.48	3,367,370.72	270,341.28	4/29/43
3304	2/16/43	3,651,168.27	4,825.48	3,637,712.00	8,630.79	7/ 5/43
260895	2/16/43	3,653,259.12	2,825.48	3,646,342.79	4,090.85	1/27/44

Total Paid on Contract	$3,650,433.64
Set Off for Rental	2,825.48
Completed Contract Price	$3,653,259.12

* Holdback includes: (1) Retained percentages until final completion; (2) Liquidated damages reserve until final completion, and (3) Rental of government equipment in sum of $2,825.48 which was set off against total contract price.

Form PAS-SF-2

EXHIBIT No. 16

Price Adjustment Section Pacific Division—
U.S. Engineer Department, 301 California St.,
San Francisco, Calif.

Date Jan. 26, 1943.

Data Required in Connection with Renegotiation of Assigned Contract(s):

1. Name of Contractor as it appears in the assigned Contract(s) with the United States: Daley Brothers.

2. Legal Address of Contractor: 426 Bryant St., San Francisco, California.

3. If Partnership: names of partners and their addresses.

John P. Daley, Los Altos, California.
Morris Daley, 789 El Camino Real, Burlingame, California.

* * *

6. Are there silent partners or persons having an interest in the earnings under the Contract who are not signatory to contract?

William Radtke, Gilroy, California.

7. Data relative to those assigned Contracts on which final payment had not been received prior to April 28, 1942. In column headed Government Service use designation "W" for War Department, "N" for Navy Department, "T" for Treasury Department and "M" for Maritime Commission.

Contract No.	Gov't. Service	Amount Received	Amount Balance Expected	Location	Per Cent Complete
W-2195-eng- 247	"W"	$3,180,536.97	$491,945.00	Delta, Utah	99%
W- 868-eng-1498	"W"	8,014.55	Contract Amt.	Delta, Utah	100%
W- 868-eng-1926	"W"	17,624.21	Contract Amt.	Delta, Utah	100%
W- 868-eng-1635	"W"	53,250.20	Contract Amt.	Delta, Utah	100%
W- 868-eng-1643	"W"	10,441.00	Contract Amt.	Delta, Utah	100%
W- 868-eng-1641	"W"	12,695.99	Contract Amt.	Delta, Utah	100%
W- 868-eng-1850	"W"	14,101.00	Contract Amt.	Delta, Utah	100%
W- 868-eng-1823	"W"	460,939.82	Contract Amt.	Delta, Utah	100%

8. Data relative to all contracts other than those assigned for renegotiation with the War, Navy and Treasury Departments and Maritime Commission, on which final payment had not been received prior to April 28, 1942.

None.

9. Brief History of the Contractors Organization.

In General Contracting Business since 1921.

10. Approximate annual Dollar volume of Construction business for prior four or five year period.

$350,000.00 Annual.

11. Type of Construction previously engaged in.

Commercial Building.

12. Affiliations:

Does Contractor have interest in or control of any subcontractor, material supplier or equipment vendor?

No.

13. Income Tax year ends, date December 31, 1942.

14. Basis used in reporting revenue from construction for income tax purposes:

Completed Contract..... Cash Receipt.... Accrual XX. (If space provided is insufficient, attach additiontal sheet.)

Subcontracts performed under Prime Contracts executed by other Contractors with the War, Navy and Treasury Departments and the Maritime Commission are to be reported under sections 7 and 8. The fact the contract is a subcontract is to be indicated by using the abbreviation "sub" immediately following the Prime Contract number shown in the column "Contract No."

None.

Certificate

I, John P. Daley, do hereby certify that I am the fully qualified Partner of Daley Brothers; further that the foregoing statements are correct to the best of my knowledge and belief.

In Witness Whereof, I have hereunto affixed my hand and the seal of the ..... this 26th day of January, 1943.

[Corporate Seal]

/s/ JOHN P. DALEY.

EXHIBIT No. 17

Daley Brothers
General Contractors
426 Bryant Street,
Phone EXbrook 7865,
San Francisco, California.

February 5, 1943.

United States Engineers,
Pacific Division,
San Francisco Branch,
San Francisco, California.

Att: Col. Ragsdale—PA-57

Gentlemen:

Referring to your letter of February 2, 1943, we wish to submit below the information you have requested.

1. As we have stated under remarks in our report no charges whatsoever for salaries of John P. Daley, Morris Daley, or William Radtke have been included, either in the job costs or in general and administrative expense. Please note, that had we been operating as a Corporation, good accounting

practice would have allowed the inclusion of these three salaries as corporate executives, a legitimate charge to the job costs for supervision. Further, had Daley Brothers extended its operations so that the time of these executives would not have been available on the job, other salaried job executives would necessarily have been hired and their salaries would have been included. We estimate that approximately $50,000 additional job costs might have been included had either of the two above mentioned conditions obtained.

2. The basis used in distributing administrative and overhead expenses between the business subject to renegotiation and the business not subject to renegotiation is as follows. All of the "other construction business" was completed in the first quarter of 1942. The Salinas job, our first major job, was started about April 1, 1942. In our distribution of administrative and overhead expenses between the business subject to renegotiation and that not subject to renegotiation we have taken the overhead costs of the first three months as chargeable to other work and the last three quarters as chargeable to the business subject to renegotiation. We believe this is a conservative basis inasmuch as several Government jobs were actually completed during the first quarter. In the last three quarters there have been no outside contracts undertaken.

3. No salaries in excess of $9,000 per annum were paid.

4. No bonuses or commissions were paid.

5. Attached hereto is an analysis of the sub-contractors by separate contract.

6. Attached hereto is an operating statement for the Canteen and Commissary operated at the Abraham Relocation Center.

In further analyzing our Canteen and Commissary operations we have become convinced that due to the confusion in our field office in this rapid job, commissary costs shown are larger than they should be due to the inclusion of labor and material items which should have been charged to general job expense. Since, however, this segregation does not in any way affect our reported profit and since accurate information for reconsideration is not now available, we have made no attempt to correct this apparent error.

You have further asked for information regarding the item of $5,290.16 for interest included in administrative expense. This item is interest accrued to January 1, 1943, on money borrowed to meet payroll and sub-contractor payments due to the slowness in clearance of partial payments from the Government. We are still paying interest on $150,000, while we have over $400,000 due us on this contract for work completed several months ago. No part of this amount was interest on capital.

Yours very truly,

DALEY BROTHERS,

By /s/ JOHN P. DALEY.

jpd/hj

Note

Following pages are on Card 3:

63	87	92
64	88	
65	89	
86	90	

Amended Return Year 1943

Daley Brothers Delta Venture
426 Bryant Street,
San Francisco, California

Schedule in Support of Gross Receipts

Item 1—Gross receipts from business:

Per return filed—year 1942	$3,655,672.28
Deduct—renegotiation refund for the amount determined on the Delta, Utah, contract on the basis of the amount of contracts which were considered in arriving at the finding of excessive profits	35,126.00
	$3,620,546.28

Note

Following pages are
on Card 3:

63 87 92
64 88
65 89
86 90

EXHIBIT No. 21

Form 843
Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of San Mateo—ss.

Name of taxpayer or purchaser of stamps: John P. Daley.

Business address: P. O. Box 127, Belmont, California.

Residence: Box 267, Los Altos, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 1st of California—San Francisco.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.

3. Character of assessment or tax, Income Tax.

4. Amount of assessment, $22,523.22; dates of payment, Quarterly 3/15—6/15—9/15—12/15/43.

5. Date stamps were purchased from the Government .....

6. Amount to be refunded $11,838.93.

7. Amount to be abated (not applicable to income, gift, or estate taxes) $.....

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on March 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

The change in the amended partnership income tax returns is for the reason that erroneous returns were filed for the years 1942 and 1943.

The amended returns as filed are consistent with the accounting procedure which was followed by Daley Brothers prior to 1942.

The amended returns are to correct the Delta, Utah, contract which was completed on September 15, 1943, and erroneously included in income for the year 1942.

The claim reflects the correct tax liability in accordance with sec. 6 of the current tax payment act of 1943, Public #68—78th Congress.

Included in the correction is the amount of renegotiation refund which was erroneously deducted from income in the 1942 return.

It is respectfully requested that refund in the amount set forth in the claim and as also shown on the amended individual income tax return for 1943 be refunded.

(Attach letter-size sheets if space is not sufficient)

/s/ JOHN P. DALEY.

Sworn to and subscribed before me this 14th day of March, 1947.

[Seal] /s/ MARY AVAYA,
Notary Public.

[Stamped]: Received Dec. 24, 1947. Internal Revenue Agent in charge, San Francisco.

[Stamped]: Received Mar. 15, 1947. Coll. Int. Rev. 1st Dist. Cal. 62.

U. S. Treasury Department
Washington 25

Mar. 21, 1952.

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
And refer to
IT:CL:O:REJ-IGJ

Mr. John P. Daley,
c o Walter H. Baer,
131 University Avenue,
Palo Alto, California.

Dear Mr. Daley:

In re: Claims for refund of $11,838.93,
$12,424.45.

For the year 1943.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

/s/ E. J. McLARNEY,
Deputy Commissioner.

Form 6917

EXHIBIT No. 22

Form 843
Treasury Department
Internal Revenue Service
(Revised July 1947)

Apr. 10, 1951.

Amended

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

☐ Refund of Taxes Illegally, Erroneously or Excessively collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Santa Clara—ss.

Name of taxpayer or purchaser of stamps: John P. Daley.

Business address: 532 Emerson St., Palo Alto, California.

Residence: Box 387, Los Altos, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 1st California, San Francisco.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.

3. Character of assessment or tax.....

4. Amount of assessment, $22,523.22; dates of payment, Quarterly 3/15; 6/15; 9/15; 12/15/43.

5. Date stamps were purchased from the Government.....

6. Amount to be refunded $12,424.45.

7. Amount to be abated (not applicable to income, gift, or estate taxes) $.....

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code.

Until rejected, 19..

The deponent verily believes that this claim should be allowed for the following reasons:

(Reasons attached)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ JOHN P. DALEY.

March 16, 1951.

[Stamped]: Received May 31, 1951. Internal Revenue Agent in charge, San Francisco.

[Stamped]: Received Apr. 9, 1951. Coll. Int. Rev., 1st Dist. Cal. 62.

Re: Claim (Form 843)
John P. Daley

The change in this amended claim for refund is the result of agreement with Examining Officer, C. H. Himes, regarding revision of income to the Trusts for the year 1943 in accordance with conference revision of income for that year.

The following reasons that this claim should be allowed are in accordance with the original claims which were timely filed:

The amended partnership returns were filed to correct the erroneous returns which were filed for years 1942 and 1943. The amended returns as filed are consistent with the accounting procedure used by Daley Brothers during the year 1943 and prior. The amended returns are to correct the Delta, Utah, contract which was completed in the year 1943 and erroneously included in income for the year 1942. The claim reflects the correct tax liability in accordance with sec. 6 of the current tax payment act of 1943, Public #68—78th Congress. Included in the correction is the amount of renegotiation refund which was erroneously deducted from income in the original 1942 return.

It is respectfully requested that overpayment in the amount set forth in this claim plus statutory interest be refunded.

U. S. Treasury Department
Washington 25

Mar. 21, 1952.

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
And refer to
IT:CL:O:REJ-IGJ

Mr. John P. Daley,
c/o Walter H. Baer,
131 University Avenue,
Palo Alto, California.

Dear Mr. Daley:

In re: Claims for refund of $11,838.93, $12,424.45.

For the year 1943.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

/s/ E. J. McLARNEY,
Deputy Commissioner.

Form 6917

[Endorsed]: Filed August 13, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

The parties, by their respective counsel, hereby stipulate that the amount of tax, if any, which plaintiffs are entitled to have refunded as a result of this action, under the findings of fact and conclusions of law entered by the Court herein, shall be determined by stipulation of the parties hereto on the basis of such findings of fact and conclusions of law; and, subject to the approval of the above named court, judgment shall be entered in accordance with such stipulation. In the event that the parties are unable to agree and stipulate as to the amount of such taxes, if any, to be refunded to the plaintiffs herein within a reasonable time after the entry of the Court's findings of fact and conclusions of law, the amount thereof shall be determined by the Court on the noticed motion of any of the parties hereto.

September 22, 1955.

/s/ ERIC SUTCLIFFE,

/s/ WILLIAM D. McKEE,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Plaintiffs.

LLOYD H. BURKE,
United States Attorney;

By /s/ LYNN J. GILLARD,
Assistant United States Attorney; Attorneys for Defendant.

[Endorsed]: Filed September 23, 1955.

[Title of District Court and Cause.]

OPINION AND ORDER FOR JUDGMENT

ERIC SUTCLIFFE,
WILLIAM D. McKEE,
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
405 Montgomery Street,
San Francisco 4, California,

Attorneys for Plaintiffs.

LLOYD H. BURKE,
United States Attorney;
LYNN GILLARD,
Assistant United States Attorney,
422 Post Office Building,
San Francisco 1, California;
H. BRIAN HOLLAND,
Assistant Attorney General;
ANDREW D. SHARPE,
ALLEN A. BOWDEN,

Attorneys, Department of Justice;
Washington 25, D. C.

Goodman, District Judge.

This is an action for the refund of income taxes paid for the year 1942, on the ground that the income reported for that year should properly have been reported for the year 1943 when it would have been substantially offset by certain losses. The in-

come in question in its entirety represented the receipts from a Government contract for the construction, during World War II, of a Japanese Relocation Center at Delta, Utah. This contract was entered into on July 8, 1942, between the United States and a construction firm known as Daley Bros., Ltd., a partnership composed of John P. Daley, Morris Daley, and Homer Bosse, trustee for the Daley brothers' children. Prior to this time, since 1935, John and Morris Daley had engaged in the construction business as a co-partnership known as Daley Bros. On June 30, 1942, Bosse, the trustee, joined the partnership as a limited partner, and the business was continued as Daley Bros., Ltd. Upon the securing of the so-called Delta contract, Daley Bros., Ltd., together with one William Radtke entered into a special partnership or joint venture, known as Daley Brothers Delta War Venture, for the purpose of performing the contract. The evidence is clear that William Radtke did not join the firm of Daley Bros., Ltd., as a partner, but that Daley Brothers Delta War Venture was a separate and distinct business entity composed of Daley Bros., Ltd., and William Radtke. Thus we may put aside at the outset, plaintiffs' contention that Daley Brothers Delta War Venture was no more than a continuation of the firm of Daley Bros., Ltd., with an additional partner, and was consequently required to follow the same accounting method in reporting its income as had been theretofore used by Daley Bros.

The Delta contract was originally scheduled to be completed on September 6, 1942. The completion date was thereafter extended several times, and finally on December 5, 1942, was extended to February 16, 1943. The contract work was in fact completed and accepted as satisfactory on behalf of the United States as of that date, although it was testified that certain matters concerning the contract were not finally settled until the following September.

Daley Brothers Delta War Venture filed a partnership income tax return for the year 1942 in which it reported as income all of the receipts from the Delta contract. In 1947, it filed an amended return for 1942 in which it reported no income for that year, and an amended return for 1943 in which it reported all of the receipts from the Delta contract as income for that year. Along with the amended partnership returns, plaintiffs filed amended individual returns and claims for refund. The amended returns and the refund claims were rejected.

Plaintiffs alleged in their claims for refund and in the complaint herein that the income from the Delta contract has been accounted for by Daley Brothers Delta War Venture by what is known as the completed contract method. Inasmuch as the Delta contract was not completed until 1943, they asserted that the contract income was properly reportable for the year 1943, and has been erroneously

reported in the 1942 return. The Government rejected the claims for refund and opposes the present action on the ground that Daley Brothers Delta War Venture, in reporting all of the receipts from the Delta contract on its 1942 return, did not err in applying the completed contract method of accounting, but in fact intentionally adopted the accrual method of accounting for its income.

Both the accrual method and the completed contract method are permissible methods of reporting income by a business engaged in performing construction contracts. By the accrual method, of course, income is reported in the year in which the right to receive it accrues. By the completed contract method, income from a construction contract is not reported as income until the year the contract is completed even though some of the income may have accrued or have been received in a prior year. The completed contract method is not an accounting method in the sense that it accounts for receipts and disbursements on a day to day basis. It is a practice of treating receipts from a contract as income as of a particular time: namely, the completion date of the contract. This is its fundamental feature.

The reporting by Daley Brothers Delta War Venture of all of the receipts from the Delta contract as income on the 1942 return was not the result of a mistaken belief on the part of anyone that the contract was completed in 1942. At the time the return was filed the taxpayers could not have had

the slightest doubt that the contract was not completed until 1943. The testimony of the accountant for Daley Brothers Delfa War Venture that he prepared the return in the belief that the Delta contract had been completed in 1942 is not credible. Inasmuch as the fundamental aspect of the completed contract method of accounting is to report contract receipts as income in the year the contract is completed, there is no merit to the contention that the intention was to report the receipts from the Delta contract by the completed contract method in the 1942 return. It is clear that all of the income from the Delta contract was intentionally reported as accruing during the year 1942, and that the accrual method of accounting for such income was thereby adopted. It is not inappropriate to comment that the taxpayers financial status at the close of 1943 made it advantageous ex post facto to report the Delta income in 1943. It does appear that some of the Delta contract income in fact did not accrue until 1943 and was improperly included in the 1942 return. To this extent the 1942 return was erroneous. But that error cannot be reached or corrected in this action. For plaintiffs in their refund claims and in the complaint herein sought refunds solely on the ground that all of the Delta contract receipts had been erroneously reported as income in 1942 as a result of a mistaken application of the completed contract method of accounting.

Judgment will enter for defendant upon findings presented according to the Rules.

Dated: February 29, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed February 29, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on September 28, 1955, before the Court, sitting without a jury, Honorable Louis E. Goodman, United States District Judge, presiding. William D. McKee, Esq., appeared for plaintiffs and Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, appeared for defendant. Oral and documentary evidence having been introduced and the matter having been briefed and the Court having filed its opinion herein on the 29th day of February, 1956, the Court makes the following

Findings of Fact

I.

The above-entitled action was brought by plaintiffs to recover, in their individual capacities, income taxes paid for the calendar year 1942 on income received by them as reported on a partner-

ship return filed for 1942 by Daley Brothers Delta Venture.

II.

Since 1935 plaintiffs John P. Daley and Morris Daley has engaged in the construction business as a copartnership known as Daley Bros. On June 30, 1942, a new partnership was created under the name of Daley Bros., Ltd., which consisted of John P. Daley, Morris Daley and Homer Bosse, trustee for the Daley Brothers' children, limited partner. A certificate of doing business under that fictitious name was filed on July 6, 1942.

III.

The income in question, in its entirety, represented the receipts from War Department Contract No. W-2195-eng-247 for the construction, during World War II, of a Japanese relocation center, at Delta, Utah. This contract was entered into on July 8, 1942, between the United States and Daley Bros., Ltd. Upon securing this contract in July, 1942, Daley Bros., Ltd., together with plaintiff, William Radtke, entered into a special partnership or joint venture called Daley Brothers Delta War Venture, for the purpose of performing the contract. The contract was originally scheduled to be completed on September 6, 1942, but the time of completion was extended several times by change orders, the latest of which, on December 5, 1942, extended the completion date to February 16, 1943. The work was completed and accepted as satisfactory on behalf of the United States as of that

date, although certain matters concerning the contract, including final payment, were settled thereafter.

IV.

For the calendar year 1942 separate partnership income tax returns were filed by each of the three entities mentioned above, to wit, Daley Bros., Daley Bros., Ltd., and Daley Brothers Delta War Venture.

V.

On the partnership return for Daley Brothers Delta War Venture it was stated that the return was prepared on the accrual basis, and on January 26, 1943, in connection with renegotiation proceedings on this contract, John P. Daley reported to the United States Army Engineers that the basis used in reporting revenue from the contract for income tax purposes was the accrual method. John P. Daley was the manager of the partnership.

VI.

In the partnership income tax return filed for the year 1942, Daley Brothers Delta War Venture reported as income the full contract price of the War Department contract. In 1947 it filed an amended return for 1942 in which it reported no income for that year, and also filed an amended return for 1943 in which it reported all of the receipts from that contract as income for 1943. Along with the amended partnership returns, plaintiffs filed amended individual income tax returns and claims for refund, which were disallowed by the Com-

missioner of Internal Revenue on March 21, 1952. The claims for refund asserted that the amended income tax returns filed in 1947 were consistent with the accounting procedure which was followed by Daley Bros. prior to 1942, and the complaint alleges that the income from the War Department contract was reported on the 1942 return under the mistaken theory that the income was earned in the calendar year 1942. Prior to 1942 the partnership known as Daley Bros. had consistently followed the completed contract method of accounting.

VII.

The reporting by Daley Brothers Delta War Venture of all of the receipts from the War Department contract as income on the 1942 return was not the result of a mistaken belief on the part of anyone that the contract was completed in 1942. At the time the return was filed the plaintiffs and their accountant knew that the contract was not completed until 1943. All of the income from the contract was intentionally reported as accruing during the year 1942 although a portion of the income from that contract did, in fact, accrue in 1943.

On the basis of the foregoing findings of fact, the Court makes the following

Conclusions of Law

I.

That William Radtke did not join the firm of Daley Bros. or Daley Bros., Ltd., as a partner, and

that Daley Bros., Daley Bros., Ltd., and Daley Brothers Delta War Venture, were each separate and distinct business entities.

II.

That Daley Brothers Delta War Venture was not required to follow the same accounting methods in reporting income as had theretofore been used either by Daley Bros. or Daley Bros., Ltd.

III.

That Daley Brothers Delta War Venture elected to report the income from the War Department contract for the year 1942 on the accrual basis of accounting. That portion of the income from the contract that actually accrued in 1943 cannot be refunded in this action because the grounds stated in the refund claims, and the basis asserted in the complaint for refund, were solely that all of the receipts from the contract had been erroneously reported as income in 1942.

IV.

That defendant is entitled to judgment herein that plaintiffs recover nothing, and dismissing the complaint.

Dated: March 23rd, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

The foregoing findings of fact and conclusions of law are hereby approved as to form.

/s/ ERIC SUTCLIFFE,

/s/ WILLIAM D. McKEE,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Plaintiffs.

Lodged March 16, 1956.

[Endorsed]: Filed March 23, 1956.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 31758

JOHN P. DALEY; MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY; WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on September 28, 1955, before the Court, sit-

ting without a jury, Honorable Louis E. Goodman, United States District Judge, presiding. William D. McKee, Esq., appeared for plaintiffs, and Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the cause submitted for decision upon briefs, and the Court having made its findings of fact and conclusions of law.

Now, Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs' complaint and cause of action therein be and the same is hereby dismissed.

Dated: March 23rd, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

The foregoing judgment is hereby approved as to form:

/s/ ERIC SUTCLIFFE,

/s/ WILLIAM D. McKEE,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Plaintiffs.

Lodged March 16, 1956.

[Endorsed]: Filed and entered March 23, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

John P. Daley, Minerva B. Daley, Morris Daley, Zelma B. Daley, William Radtke, Clara Radtke and Homer Bosse, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley, the plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 23, 1956.

Dated: May 21, 1956.

/s/ ERIC SUTCLIFFE,

/s/ WILLIAM D. McKEE,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 22, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, John P. Daley, Minerva B. Daley, Morris Daley, Zelma B. Daley, William Radtke, Clara Radtke and Homer Bosse, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D.

Daley, Plaintiffs and Appellants in the above-entitled action, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against them in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendant in said action, on the 23rd day of March, 1956; and

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned:

Now, Therefore, Fireman's Fund Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself bound to the said Defendant in the sum of Two Hundred Fifty and No/100 Dollars ($250.00) that the said appellant will pay all costs which may be adjudged against them on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars ($250.00).

It Is Further Stipulated As a part of the foregoing undertaking that in case of the breach of any condition thereof, the above-entitled District Court may, upon notice to the Surety of not less than ten days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 21st day of May, 1956.

FIREMAN'S FUND INDEMNITY COMPANY,

[Seal] By /s/ A. C. JOHNSON,
Attorney-in-Fact.

State of California,
City and County of San Fransisco—ss:

On this 21st day of May, 1956, before me, Mercedes Miller, a Notary Public in and for said City and County, state aforesaid, residing therein, duly commissioned and sworn, personally appeared A. C. Johnson, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] /s/ MERCEDES MILLER,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires January 22, 1959.

[Endorsed]: Filed May 22, 1956.

The United States District Court, Northern District of California, Southern Division

No. 31758

JOHN P. DALEY, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Wednesday, September 28, 1955

Appearances:

For the Plaintiffs:
ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE, by
WILLIAM D. McKEE, ESQ.

For the Defendants:
LLOYD H. BURKE,
U. S. Attorney, by
LYNN GILLARD, ESQ.,
Assistant U. S. Attorney.

The Clerk: Daley versus the United States, for trial.

Mr. McKee: Plaintiff is ready.

The Clerk: Will respective counsel state their appearances for the record?

Mr. McKee: William D. McKee, for the plaintiffs.

Mr. Gillard: Lynn Gillard, for the United States Attorney's Office, for the defendant.

Mr. McKee: Your Honor, this is another tax action. It is an action for the recovery of federal income taxes paid by three partners in the construction business, and their wives and certain trusts, which also had an interest in that business.

The only legal issue of which I am aware in the case is whether the income from a certain construction contract, which was in progress on December 31, 1942, should have been reported in 1943, as claimed by the plaintiffs, when the contract was completed, or in 1942 as claimed by the Government. [4*]

* * *

If I may review the stipulated facts for your Honor, John and Morris Daley, two of the plaintiffs in this action were, in 1942, and for many years prior thereto, engaged in the construction business as contractors, and they were partners and operated under the firm name of Daley Bros.

In 1942 they each established trusts for their minor children and admitted the trustee to the partnership as a limited partner.

The Court: I didn't get that last. [6]

Mr. McKee: The trustee to the partnership as a limited partner.

In 1942 they also entered into a special partner-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ship with William Radtke, another contractor, and also with his wife, one of the plaintiffs in the proceeding.

The stipulated fact states that in July of 1942 the partnership received a government contract for the construction of the Abraham Japanese Relocation Center in Delta, Utah. The contract was originally for the sum of $2,834,000, and it was to be completed in September of 1942. However, after the work commenced, the contract was changed so that the final contract price was $3,653 and some odd thousand dollars, and the completion date was extended to February 16, 1953. The fact is stipulated that the contract was actually completed and accepted in 1943.

The legal question before the Court is one of income tax accounting. It is the position of the plaintiffs that the income which was realized by the partnership on this particular Abraham Relocation Center contract was something in excess of $175,000, originally reported as $206,000, it is our position that that was taxable only in the year the contract was completed; that is, in 1943.

In fact, the income was originally reported by the partnership in its 1942 income tax return, and the plaintiffs will show that this was done in the mistaken belief that the [7] contract was completed in 1942, when in fact, it wasn't completed until 1943.

I will ask that the plaintiffs be permitted to submit the legal question on written briefs and authorities with respect to it——

The Court: That is the question as to when the income was—when, under the applicable statutes the taxpayers were entitled to account for the income.

Mr. McKee: When required and entitled to report that income. I would like to refer to three legal propositions, however, which we consider fundamental to our case. The first of these is in Section 41 of the Internal Revenue Code—the 1939 Code is what I am speaking of; that was the applicable code at that time—and that section prescribes the general rule for income tax accounting. And it states that the net income shall be computed upon the basis of the taxpayer's annual accounting period, fiscal year or calendar year, as the case may be, in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but if no such method of accounting has been so employed, or method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income.

It is the plaintiff's position, and we intend to prove [8] that the method of accounting which was regularly employed by the plaintiffs was the completed contract method which permitted or required the plaintiffs to report the income from the contract only at the time it was completed.

The second authority with respect to income tax accounting is—which I would like to refer to now—is in the Treasury regulations, and these regulations specifically provide that any approved stand-

ard method of accounting will ordinarily be regarded as clearly reflecting income for the purposes of Section 41 of the Code, and they also specifically approve the so-called completed contract method of accounting for contractors, persons in the building and construction and installation trades, is the way the regulations put it.

The language of the regulations in that regard is that gross income may be reported for the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income.

The courts have held these regulations are applicable to any construction contract which spans a year end. In other words, if a contract is commenced, for example, in July and is completed in the next March, even though that contract does not extend for a period longer than a year, as long as it spans a year the completed contract method is permissible, is a permissible method of reporting income, and that has been [9] held by the Board of Tax Appeals and affirmed in the Sixth Circuit, and certiorari denied.

In 1954 the Ninth Circuit Court of Appeals also held that under the completed contract method of accounting, income for taxable purposes was reportable in the year the contract was finally completed and accepted and not simply when the contract is substantially completed. That was the case of E. E. Black, Ltd., vs. Alsop, 211 F. 2nd 879. And that is the situation in this case.

The testimony will reveal that the contract was, a major portion of the contract was completed on December 31, but not fully completed, and there was a substantial amount still to be done.

The Court: Were payments made?

Mr. McKee: Payments were made, some payments were made prior to 1943 and some payments made after '43. The last payments—it is in the stipulation, and I don't recall precisely, but I think the last payments were made substantially after the completion date of the contract.

The Court: Why do you get a refund if you account in 1943? Was there more income in 1942?

Mr. McKee: Each of the partners had very substantial income in 1942 and losses in 1943, your Honor. Also I believe the current Tax Payment Act of 1943 has a major effect here. That was a law which permitted the forgiveness of either [10] the 1942 or 1943 tax, or 75 per cent of it, whichever was lower. It is principally a matter of whether the income was earned in 1942 or 1943 affecting the tax rates.

One more point which I would like to make is that it has been conceded by the Government in the pleadings and in the stipulation of facts on file, until 1942 the partnership, Daley Bros., which was formed, was stipulated it was formed in 1935, consistently, from the time of formation kept their books and reported their income on a completed contract basis.

The Commissioner's regulations, in addition, do

not permit a taxpayer to change his accounting method unless he first secures the consent of the Commissioner, and the regulations specifically make that rule applicable to changes away from the completed contract method.

It is our contention, and I think we will prove that in fact we were on the completed contract method in 1942. But in any event, it will be shown the consent of the Commissioner to change the method of accounting reported by Daley Bros. was never requested or received.

It is also a matter of settled law, in which the Commissioner has acquiesced by rulings, that the admission of a partner to a partnership does not terminate the old partnership for tax purposes regardless of the formalities which were undertaken in admitting a new partner or even—in fact, there was a dissolution of a general partnership and a new [11] limited partnership was formed—so long as the business continues. So that it can't be argued that by participating of the trusts and William Radtke in the contract, which we will discuss, that the Daley Bros. in any way became entitled or obligated to change their method of accounting from the completed contract method to any other method.

Mr. Gillard: I would like to, if the Court please, make the Government's position clear as to what our contentions are in this case. They are twofold. One is that the entity that made the return, which is the subject of this dispute, that is, the Daley Brothers Delta Venture, was a separate, taxable entity, returned a partnership return under that

name and was a new entity commencing in the middle of the year 1942; was separate and distinct from Daley Bros. old, or Daley Bros., Ltd., or another venture which was formed in the same year.

Secondly, although the law, as accurately stated in the Ninth Circuit, does support the proposition that on a completed contract basis the income cannot be reported until the contract is completed, that doesn't mean substantially, it means all, that that has no application in this case because the entity involved chose to file a return on the accrual basis at the end of 1942. Therefore, the question of whether the contract was mistakenly assumed by an accountant to have been completed at the end of 1942 is completely immaterial, that the records, the entire evidence does not show that any [12] mistake was made, all parties were fully aware of the fact that this contract was completed in 1943. The stipulation so recites. Exhibit 16 in the stipulation shows that prior to the time the return was filed, one of the partners filed a document with the Army Engineers in which he stated that at that time the contract was 99 per cent completed, and that all the evidence in the record shows—all the evidence in the case shows that there was no mistake being made whatsoever.

The Court: The return of this particular venture was on an accrual basis?

Mr. Gillard: That is correct, your Honor. And the Exhibit 16 to which I referred, which was a report by the partner to the Army Engineers for

the purpose of renegotiation of all contracts entered into in 1942, one question in there asks whether or not the partnership books are kept on the accrual basis, the cash basis or a completed contract basis, and John Daley, the partner, said they were kept on the accrual basis, that item was checked. That was prior to the time this return was filed in this case.

The Court: And there was a return filed for the venture for 1942 on an accrual basis and the tax was paid on that?

Mr. Gillard: That is correct: What happened, I think it's fair to say, from the question that the Court asked in response to Mr. McKee, is that in 1943 these partners [13] suffered a substantial loss, and in 1947 they decided that the way to cure that situation was to throw a portion of their 1942 income into 1943. When I say a portion, the Daley Brothers Delta Venture is only, was approximately one half of the total income for 1942. By throwing that income into 1943 they would wipe out the 1943 loss and have an income in 1943 to which the 75 per cent credit by virtue of the curren. Tax Payment Act would apply. The result is a saving of $80,000, which is approximately the amount of the suit involved herein.

Now, here is the factual situation. There was a partnership known as Daley Bros., consisting of John Daley and Morris Daley, who were in the general contracting business doing mostly commercial construction and specializing, apparently, in the construction of gas stations.

In 1941 or 1940 a small contract was secured with the Army Engineers. In 1942 a larger contract was secured with the Army Engineers for the gross amount of $350,000, as I recall. So up came 1942, and they secured in the first half of 1942 about eight contracts. Apparently at that time it was deemed advisable to associate. It may be that Mr. Radtke was associated in 1941. I don't find any evidence of it, but maybe the plaintiffs will produce it. But in any event, Mr. Radtke was associated on a joint venture arrangement in 1942 under a joint venture which was called the Daley Bros. [14] Barracks Venture, and the Daley Bros. Barracks Venture handled about eight contracts in all, including one down in Salinas, which was for a gross of around $450,000. All of the work under the Daley Bros. Barracks Venture was substantially completed by the middle of 1942.

A partnership return was filed for Daley Bros. Barracks Venture showing the net income to the three people involved in there, John Daley, Morris Daley and William Radtke in equal shares.

Those activities in the first part of 1942 proved to be so profitable that the Daley Bros. find themselves in an extremely high income tax bracket, and in the middle of 1942 created trusts for their children. I think there were four children, if I am not mistaken, each brother had. A trustee named Bosse was named to control those trusts, and then after the creation of the trusts a new limited partnership was formed consisting of Bosse, the trustee; John

Daley and Morris Daley, and a certificate of doing business under a fictitious name was filed in July of 1942. And in July of 1942 this contract that we are dealing with in this case, the Abraham Relocation Center at Delta, Utah, was secured. That was the contract originally for $2,830,000. That contract was taken in the name of Daley Bros.

In the performance of the work however, another joint venture was formed with William Radtke, this time the [15] associates being, in addition to Radtke and John Daley and Morris Daley, the trustee, Homer Bosse. It's a completely separate entity, different from anything that theretofore had existed.

That joint venture filed a return on the accrual basis at the end of 1942 accruing the total anticipated revenue from the contract, accruing the total anticipated costs from the contract, computing the net profit, at that time of $206,000 and distributing the same in accordance with the agreements to the four people interested therein.

In the same year there was also filed two other partnership returns, one for Daley Bros., which we call Daley Bros. old, which consists of Morris Daley and John Daley, and one for Daley Bros., Ltd., which consisted of John Daley, Morris Daley and Bosse, the trustee. So you have got four separate partnership returns filed in the year 1942.

Now, the partnership return for Daley Bros. old was for the period primarily up to the middle of 1942 and primarily reported the income from the Daley Bros. Barracks Venture. But in addition to that there was other income. The Daley Bros. Bar

racks Venture distributed to William Radtke his share of the profits from those joint ventures, the share of the income from those joint ventures which went to Daley Bros. was in turn reported on a partnership for Daley Bros. in which there was other income in addition to the Barracks [16] Venture. So that they had separate accounting between themselves for that additional income which Radtke didn't share.

Similarly, a partnership return was filed for the Delta Venture in which Radtke received his share of around $62,000. The proportionate share, the net income share going to Daley Bros., Ltd., was then returned on a partnership return filed by Daley Bros., Ltd., in which return there was also additional income which Radtke did not share in. So that you have four different separate taxable entities filing returns in 1942, this being a new venture and a joint venture as a partnership under the Internal Revenue Code, and a partnership is a taxable entity, and clearly there were four taxable entities involved herein.

Secondly, as I indicated to the Court, it is our position that the accountant did not make any mistake in keeping these books. They were kept on the accrual basis, the partner so stated on the return, they are kept on the accrual basis in their reports to the Army Engineers in connection with renegotiation, they have stated they are on the accrual basis, and that statement was made prior to the time the return was filed, and everything in those books is consistent with an accrual basis of account-

ing, and there are many things in there which are inconsistent with the idea that the partners at that time or the bookkeeper, mistakenly assumed that the contract was completed on December 31, of 1942. [17]

The position of the Government is that they made an election on their first return to file on the accrual basis, that that method cannot be changed without the consent of the Commissioner and that having made that election, in effect, if the Court please, they are stuck with it.

The Court: When was the completion date? What is that change?

Mr. McKee: The completion date of February 16—when was that date arrived at?

The Court: I haven't been able to find it here. I see December 5, 1942. Is that right?

Mr. Gillard: On December the 5th—yes, your Honor, on December 5, by virtue of change order No. 10, the only change involved in that change order was an extension of the completion date of the contract for 73 days on the ground that the contractors had been delayed in securing materials because of the operation of the priority system, that the contractors had been delayed in the performance of the contract for a total of 73 days, and on that date they were allowed an additional 73 days to complete that contract. Obviously at that time Daley Bros. were asking for an additional 73 days to complete the contract, on December 5, 1942, and obviously they weren't asking for 73 days because of delays under any stretch of the imagination

where they assumed that the contract could be completed within the next 26 days. [18]

The Court: The 1942 return, then, on this particular venture, was filed when, in 1943?

Mr. Gillard: The return was filed on March 15, 1943.

The Court: On an accrual basis?

Mr. Gillard: On an accrual basis, according to the return itself, and according to the statement——

The Court: On an accrual basis, for the year 1942.

Mr. Gillard: That is correct. And in addition to that, the contract on the accrual basis returned the additional income which was allocated to the contract by virtue of change order No. 11 dated February 4 and supplemental agreement modification No. 13 dated February 15. That totals around $7,000, but small things sometimes indicate which way the wind is blowing.

Mr. McKee: Your Honor, may I make one point, lest I be taken to acquiesce in everything Mr. Gillard has said.

It is true that the return was filed in the name of Daley Bros. Delta Venture, and it is true that there is a mark on it saying that it was accrual. However——

The Court: What was that last?

Mr. McKee: That it is true that the return states that the return was filed on the accrual basis. However, there is no room on the return for completed contract basis. In addition, the bool of ac-

count in accounting for amounts spent were written up on the accrual basis in the sense that when [19] an amount was owed it was written in the books. That's the essential nature of the accrual basis, and the accrual basis of accounting is not inconsistent with the completed contract method of reporting income.

I would also like to point out that in connection with the question of whether the Delta Venture filed a return on the accrual basis or on the completed contract basis, that a return was filed in the name of Delta Venture for 1942 but no return was filed in 1943 in that name, and the reason for that is it was completed, it was considered that that particular contract had been completed in 1942 for the purposes of income tax——

The Court: Supposing the time came for filing the return, or at any time during the taxable year, the taxpayer would have the option or choice of making his return on more than one basis and he elected one?

Mr. McKee: It is our position, your Honor, that the taxpayer did not have that choice, that as one continuing—in effect, one continuing business, for tax purposes, using one continuing set of books, it was required to account, for tax purposes, on the same method.

The Court: Well then, according to what you say and what the United States Attorney says, the main question is going to be whether these were separate enterprises or whether it was one business. [20]

Mr. McKee: I think, if your Honor please, that there is another question, and that is whether the return was filed on the accrual basis or on the completed contract basis. If you file on the completed contract basis, then even though it was a separate entity, a new and separate entity, the return was prepared showing income in the wrong period because the contract wasn't completed in 1942, it wasn't completed until '43. So that even if there was a separate entity, that entity never elected to file on an accrual basis.

The Court: What you are saying is that a contract entered into which is to be performed partly in one year and partly in another year, in such case the taxpayer cannot file a return on an accrual basis?

Mr. McKee: He can file a return closing out his books as of December 31 even though the contract is not carried over if his books are kept in accordance with that method.

The Court: So he can properly and should properly file a return on the accrual basis rather than a completed contract basis if that is the basis upon which his records are kept.

Mr. McKee: Except that the regulations provide that if that method does not clearly reflect income he may not use that method, he must use a method which clearly reflects income, and I believe it will be shown by expert testimony that in the contracting business it is generally considered that only the completed contract method, or another method, the [21] percentage of completion method, clearly

reflects income, and I don't believe there will be any testimony that these taxpayers were on the percentage of completion method.

The Court: What is that method?

Mr. McKee: That is a method under which, as I understand it, on the basis of engineers' reports, you determine the percentage of total completion and the percentage of total costs which will be incurred in the contract and then—well, in order to determine the percentage of completion, you determine the total costs and the total receipts and you deduct from the total costs the total receipts and apply the percentage of completion to find your percentage of profit.

The Court: Well, doesn't it come down to this, that under the applicable regulations and the statute the plaintiff can recover here if it was required to file a return, under the facts, on a completed contract basis, under the law and regulations?

Mr. McKee: Or if in fact he filed a return on the completed contract basis. In either event, it is our contention the plaintiffs are entitled to recover.

The Court: You're making both contentions, that the return was in fact made under the completed contract basis——

Mr. McKee: We are making the contention——

The Court: Mistakenly made on an accrual basis when it should have been made on a completed contract basis? [22]

Mr. McKee: No, your Honor, we are not. We are making the contention that the books of account were kept on the completed contract method, that it

CLA. 32. Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(a) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the contractor under this contract can be determined with reasonable certainty, the Secretary of War and the contractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall be retained by the Government or repaid to the Government by the contractor, as directed by the Secretary of War.

(c) Each fixed-price or lump sum subcontract in an amount in excess of $1,000 entered into by the contractor hereunder shall include the following provisions:

"ARTICLE ____. Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(1) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to _____ (subcontractor) under this contract can be determined with reasonable certainty, the Secretary of War and _____ (subcontractor), upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(2) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Secretary of War--

(A) Be deducted by _____ (prime contractor) from payments to _____ (subcontractor) under this contract; or

(B) Be paid by _____ (subcontractor) directly to the Government; or

(C) Be repaid by _____ (subcontractor) to _____ (prime contractor).

(3) _____ (subcontractor) agrees that _____ (prime contractor) shall not be liable for or on account of any amount repaid to _____ (subcontractor) or paid to the Government by _____ (subcontractor) or deducted by _____ (prime contractor) from payments under this contract, pursuant to directions from the Secretary of War in accordance with the provisions of this Article. Under its contract with the Government, _____ (prime contractor) is obligated to pay or credit to the Government amounts repaid by or withheld from _____ (subcontractor) hereunder.

(4) The term "Secretary of War" as used in this Article includes any duly authorized representative, including the Contracting Officer.

(d) If any renegotiation between the Secretary of War and any subcontractor pursuant to the provisions required by paragraph (c) hereof results in a reduction of the contract price of the subcontract, the Government shall retain from payments to the contractor under this contract, or the contractor shall repay to the Government, as the Secretary of War may direct, the amount of such reduction, less any amounts paid thereon by the subcontractor directly to the Government.

(e) The term "Secretary of War" as used herein includes his duly authorized representatives.

[redacted]

owner or part owner

Daley Brothers, a partnership consisting of John P. Daley and Morris Daley of the City of San Francisco, in the State of California,

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an employee of this organization receiving compensation therefrom, employed by the Government on construction work under the jurisdiction of the Construction Division, Office of the Chief of Engineers. It is further certified that this firm will not take on as a partner, executive officer, director, or employee any person who is at the present time employed by the Government on construction work under the jurisdiction of the Construction Division, Office of the Chief of Engineers, during the life of any competitive bid lump sum construction contract or any negotiated cost-plus-a-fixed-fee construction or architect-engineer contract unless expressly authorized to do so by the Chief of the Construction Division, Office of the Chief of Engineers.

Signed and witnessed this 1st day of July 1942.

CONTRACTOR

DALEY BROTHERS

BY John P. Daley
John P. Daley

Two witnesses:

Harold W. Black
[illegible]
(address)

W. D. Evans
[illegible]
(address)

Strike out the one which does not apply.
State whether a partnership, a corporation, or an individual.

-6-

FORM 1065
Treasury Department
Internal Revenue Service

UNITED STATES . Original Return

PARTNERSHIP RETURN OF INCOME 1942

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1942

or fiscal year beginning ....., 1942 and ending ....., 1943

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

DALEY BROTHERS DELTA VENTURE
(Name)

426 BRYANT STREET
(Street and number)

SAN FRANCISCO, CALIFORNIA
(Post office) (County) (State)

Business or Profession CONTRACTORS

Do Not Use These Spaces

File Code

Serial No.

District
(Date Received)

GROSS INCOME

Item and Instruction No.				
1. Gross receipts from business or profession			$ 3[illegible]55672.	28
2. Less cost of goods sold:				
(a) Inventory at beginning of year	$			
(b) Merchandise bought for sale				
(c) Cost of labor, supplies, etc.	3449421	84		
(d) Total of lines (a), (b), and (c)	$3449421	84		
(e) Less inventory at end of year			3449421	84
3 Gross profit (or loss) from business or profession (item 1 minus item 2)			$206250	44
4. Income (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):				
5. Interest on bank deposits, notes, etc.				
6. Interest on corporation bonds, etc. (except interest to be reported in item 7)	$	Less amortizable bond premium $		
7. Interest on tax-free covenant bonds upon which a Federal tax was paid at source	$	$		
8. Interest on Government obligations, etc.:				
(a) From line (h), Schedule A	$	$		
(b) From line (i), Schedule A	$	$		
9. Rents				
10. Royalties				
11. Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule B)				
12. Dividends				
13. Other income (state nature of income):				
14. Total income in items 3 to 13 (enter nontaxable income in Schedules A and C)			$ 206250	44

DEDUCTIONS

15. Salaries and wages (do not include compensation for partners)	$	
16. Rent		
17. Repairs		
18. Interest on indebtedness (explain in Schedule F)		
19. Taxes (explain in Schedule C)		
20. Losses by fire, storm, shipwreck, or other casualty, or theft (submit schedule)		
21. Bad debts (explain in Schedule D)		
22. (a) Depreciation (explain in Schedule E)		
(b) Amortization of emergency facilities (attach statement)		
23. Depletion of mines, oil and gas wells, timber, etc. (submit schedule)		
24. Other deductions authorized by law (explain in Schedule F)		
25. Total deductions in items 15 to 24		
26. Ordinary net income (item 14 minus item 25)		$ 206250 44
27. Net short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H)	[redacted]	$
28. Net long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H)		$

16—88827-2

Daley Brothers Delta Venture (Original Return) Year 1942

Schedule J.—PARTNERS' SHARES OF INCOME AND CREDITS. (See Instruction 28) Page 4

	1. Name and address of each partner (Designate nonresident aliens) Where return of partner or member is filed in another collection district, specify district. If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary net income less interest on Government obligations, etc., subject to surtax only (Item 28, page 1, minus Item 8 (a), page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (From Schedule H, Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (From Schedule H, Summary, line 2, column 4)
(a)	Daley Brothers S.F.	$ 144166 96	$	$
(b)	William Radtke Gilroy	62083 48		
(c)				
(d)				
(e)				
(f)				
(g)				
Totals		$ 206250 44	$	$

CONTINUATION OF SCHEDULE J

5. Use letter corresponding to above to identify partner	6. Wholly tax-exempt obligations (Items (a), (b), (c), and (d) of Schedule A)		Partially tax-exempt				9. Earned income	10. Charitable contributions (from Schedule I)	11. Federal income tax paid at source (2 percent of gross amount in item 7, page 1)	12. Income and profits taxes paid to a foreign country or United States possession
			7. United States Savings Bonds and Treasury Bonds (Item (e), Schedule A)		8. Obligations of certain instrumentalities of the United States (Item (f), Schedule A)					
	a. Principal	b. Interest	a. Principal	b. Interest less amortizable bond premium	a. Principal	b. Interest less amortizable bond premium				
	$	$	$	$	$	$	$	$	$	$
Totals	$	$	$	$	$	$	$	$	$	$

QUESTIONS

1. Date of organization 6/1/42
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Joint Venture
3. Was a return filed for preceding year? No If so, to which collector's office was it sent?
4. Check whether this return was prepared on the cash ☐ or accrual ☒ basis.
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market, whichever is lower
   If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock
6. Did the organization at any time after October 3, 1942, and before the end of its taxable year have in its employ more than eight individuals? (Answer "Yes" or "No") Yes
   If answer is "Yes," has the organization in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate after October 3, 1942? (Answer "Yes" or "No") No If answer to second question is "Yes," attach a statement explaining all such increases or decreases. If any of such increases or decreases required the prior approval of the National War Labor Board or the Comissioner of Internal Revenue as stated in instruction 15, attach also a copy of the authorization for each of such increases or decreases.
7. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No
   If answer is "Yes," attach schedule required by Instruction I.
8. Was return of information on Forms 1096 and 1099 filed for the calendar year 1942? (See Instruction H) Yes

AFFIDAVIT (See Instruction D)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

(Signature of person (other than partner or member) preparing return) (Date)

(Name of firm or employer, if any)

Subscribed and sworn to before me this _____ day of _____, 194__

(Signature of officer administering oath) (Title)

(Partner or member) (Date)

(Address of partner or member)

Subscribed and sworn to before me this _____ day of _____, 194__

(Signature of officer administering oath) (Title)

☆ U. S. GOVERNMENT PRINTING OFFICE : 1942 16—26287-2

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FORM 1065
Treasury Department
Internal Revenue Service

AMENDED RETURN

Year 1942

UNITED STATES

PARTNERSHIP RETURN OF INCOME ~~1941~~ 1942

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year ~~1941~~ 1942

or fiscal year beginning ....., 1941, and ending ....., 1942

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

Daley Brothers Delta Venture
(Name)

426 Bryant Street
(Street and number)

San Francisco, California
(Post office) (County) (State)

Business or Profession Contractors

Do Not Use These Spaces

File Code .....

Serial No. .....

District .....
(Date Received)

GROSS INCOME

Item and Instruction No.			
1.	Gross receipts from business or profession (Advances only $3,180,536.97)		$ NONE
2.	Less cost of goods sold:		
	(a) Inventory at beginning of year	$ NONE	
	(b) Merchandise bought for sale	$2,487,345.78	
	(c) Cost of labor, supplies, etc.	731,574.31	
	(d) Total of lines (a), (b), and (c)	$3,218,920.09	
	(e) Less inventory at end of year	3,218,920.09	NONE
3.	Gross profit (or loss) from business or profession (item 1 minus item 2)		$
4.	Income (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):		
5.	Interest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 6)		
6.	Interest on tax-free covenant bonds upon which a Federal income tax was paid at source		
7.	Interest on Government obligations, etc.:		
	(a) From line (h), Schedule A, $.....; (b) from line (i), Schedule A, $.....		
8.	Rents		
9.	Royalties		
10.	Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule B)		
11.	Dividends		
12.	Other income (state nature of income):		
13.	Total income in items 3 to 12 (enter ordinary income in Schedules A and C)		$ NONE

DEDUCTIONS

14.	Salaries and wages (do not include compensation for partners)	$
15.	Rent	
16.	Repairs	
17.	Interest on indebtedness (explain in Schedule F)	
18.	Taxes (explain in Schedule C)	
19.	Losses by fire, storm, shipwreck, or other casualty, or theft (submit schedule)	
20.	Bad debts (explain in Schedule D)	
21.	Depreciation (explain in Schedule E)	
22.	Depletion of mines, oil and gas wells, timber, etc. (submit schedule)	
23.	Other deductions authorized by law (explain in Schedule F)	
24.	Total deductions in items 14 to 23	NONE
25.	Ordinary net income (item 13 minus item 24)	$ NONE
26.	Net short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H)	$
27.	Net long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H)	$

EX 19

Daley Brothers Delta Venture(Amended Return) Year 1942

Schedule J.—PARTNER SHARES OF INCOME AND CREDITS. (See Instruction 28)

1. Name and address of each partner (Designate nonresident aliens) Where return of partner or member is filed in another collection district, specify district. If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary net income less interest on Government obligations, etc., subject to surtax only (Item 25, page 1, minus item 7 (a), page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 2, column 4)
(a) Daley Brothers S.F.	$ NONE	$	$
(b) William Radtke Gilroy	NONE		
(c)			
(d)			
(e)			
(f)			
(g)			
Totals	$ NONE	$	$

CONTINUATION OF SCHEDULE J

5. Use letter corresponding to above to identify partner	6. Wholly tax-exempt obligations (lines (a), (b), (c), and (d) of Schedule A)		Partially tax-exempt				9. Earned income	10. Charitable contributions (from Schedule I)	11. Federal income tax paid at source (2 percent of item 6, page 1)	12. Income and profits taxes paid to a foreign country or United States possession
			7. United States Savings Bonds and Treasury Bonds (line (e), Schedule A)		8. Obligations of certain instrumentalities of the United States (line (f), Schedule A)					
	Principal	Interest	Principal	Interest	Principal	Interest				
	$	$	$	$	$	$	$	$	$	$
Totals	$	$	$	$	$	$	$	$	$	$

QUESTIONS

1. Date of organization 6/1/42
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Joint Venture
3. Was a return filed for preceding year? No If so, to which collector's office was it sent?
4. Check whether this return was prepared on the cash ☐ or accrual ☒ basis.
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market, whichever is lower
   If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock
6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No
   If answer is "Yes," attach schedule required by Instruction I.
7. Was return of information on Forms 1096 and 1099 filed for the calendar year 1941? (See Instruction H) Yes

AFFIDAVIT (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to before me this ..... day of ....., 194.....

..... (Partner or member)

..... (Signature and title of officer administering oath)

..... (Address of partner or member)

(If this return was prepared for you by some other person, the following affidavit must be executed)

AFFIDAVIT (See Instruction D)

I/we swear (or affirm) that I/we prepared this return for the organization named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this

..... day of ....., 194.....

..... (Signature of person preparing the return)

..... (Signature of person preparing the return)

..... (Signature and title of officer administering oath)

..... (Name of firm or employer, if any)

U S GOVERNMENT PRINTING OFFICE 16—25637-1

FORM 1065
Treasury Department
Internal Revenue Service

UNITED STATES

Year 1943

COPY

PARTNERSHIP RETURN OF INCOME

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year [redacted]

or fiscal year beginning [redacted], and ending [redacted]

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

Daley Brothers Delta Venture
(Name)

486 Bryant Street
(Street and number)

San Francisco — California
(Post office) (County) (State)

Business or Profession Contractors

Do Not Use These Spaces

File Code

Serial No.

District

(Date Received)

Item and Instruction No.			
	GROSS INCOME		
1.	Gross receipts from business or profession [redacted]		[redacted]
2.	Less cost of goods sold:		
	(a) Inventory at beginning of year	$	
	(b) Merchandise bought for sale	[redacted]	
	(c) Cost of labor, supplies, etc.	[redacted]	
	(d) Total of lines (a), (b), and (c)	[redacted]	
	(e) Less inventory at end of year	[redacted]	[redacted]
3.	Gross profit (or loss) from business or profession (item 1 minus item 2)		[redacted]
4.	Income (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):		
5.	Interest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 6)		
6.	Interest on tax-free covenant bonds upon which a Federal income tax was paid at source		
7.	Interest on Government obligations, etc.:		
	(a) From line (h), Schedule A, $; (b) from line (i), Schedule A, $		
8.	Rents		
9.	Royalties		
10.	Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule B)		
11.	Dividends		
12.	Other income (state nature of income):		
13.	Total income in items 3 to 12 (enter nontaxable income in Schedules A and C)		[redacted] 44
	DEDUCTIONS		
14.	Salaries and wages (do not include compensation for partners)	$	
15.	Rent		
16.	Repairs		
17.	Interest on indebtedness (explain in Schedule F)		
18.	Taxes (explain in Schedule C)		
19.	Losses by fire, storm, shipwreck, or other casualty, or theft (submit schedule)		
20.	Bad debts (explain in Schedule D)		
21.	Depreciation (explain in Schedule E)		
22.	Depletion of mines, oil and gas wells, timber, etc. (submit schedule)		
23.	Other deductions authorized by law (explain in Schedule F)		
24.	Total deductions in items 14 to 23		[redacted]
25.	Ordinary net income (item 13 minus item 24)		$
26.	Net short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H)		$
27.	Net long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H)		$

16—25637-1

Daley Brothers Delta Venture (Amended Return) Year 1943

Schedule J.—PARTNER HARES OF INCOME AND CREDITS. (S struction 28)

1. Name and address of each partner (Designate nonresident aliens) Where return of partner or member is filed in another collection district, specify district If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary net income less interest on Government obligations, etc., subject to surtax only (item 25, page 1, minus item 7 (a), page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule H, Summary, line 2, column 4)
(a) Daley Brothers, San Francisco, Calif.	120,749 68	$	$
(b) William Radtke, Gilroy, Calif.	50,374 76		
(c)			
(d)			
(e)			
(f)			
(g)			
Totals	$ 171,124 44	$	$

CONTINUATION OF SCHEDULE J

5. Use letter corresponding to above to identify partner	6. Wholly tax-exempt obligations (lines (a), (b), (c), and (d) of Schedule A)		Partially tax-exempt				9. Earned income	10. Charitable contributions (from Schedule I)	11. Federal income tax paid at source (2 percent of item 6, page 1)	12. Income and profits taxes paid to a foreign country or United States possession
			7. United States Savings Bonds and Treasury Bonds (line (a), Schedule A)		8. Obligations of certain instrumentalities of the United States (line (f), Schedule A)					
	Principal	Interest	Principal	Interest	Principal	Interest				
	$	$	$	$	$	$	$	$	$	$
Totals	$	$	$	$	$	$	$	$	$	$

QUESTIONS

1. Date of organization June 1, 1942
2. Nature of organization (partnership, syndicate, pool, joint venture, etc.) Joint venture
3. Was a return filed for preceding year? No If so, to which collector's office was it sent?
4. Check whether this return was prepared on the cash ☐ or accrual ☒ basis.
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market, whichever is lower
   If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock
6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No
   If answer is "Yes," attach schedule required by Instruction I.
7. Was return of information on Forms 1096 and 1099 filed for the calendar year 1941? (See Instruction H) Yes

AFFIDAVIT (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to before me this ..... day of _____, 194.....

Mons Daley
(Partner or member)

(Signature and title of officer administering oath)

(Address of partner or member)

(If this return was prepared for you by some other person, the following affidavit must be executed)

AFFIDAVIT (See Instruction D)

I/we swear (or affirm) that I/we prepared this return for the organization named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this

..... day of ....., 194.....

(Signature of person preparing this return)
Walter Baer
(Signature of person preparing the return)
WALTER H. BAER
(Name and address, if not employer, if any)
Public Accountant
Palo Alto, Calif.

(Signature and title of officer administering oath)

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was considered that this particular contract was completed, that the return was filed in accordance with the books, and since there was a mistake, and in fact, the contract was not completed until the next year, the taxpayer is required and entitled to report that income in the next year.

Mr. Gillard: Under those circumstances we could talk all morning. I want to call the Court's attention to two things. One is that when counsel talks about the fact that if the plaintiff mistakenly filed on a completed contract method, assuming that the contract was completed at the end of 1942, then that would be an improper type of a thing and they would have to change, completely ignoring the fact that the Commissioner has not objected to that return. The only time we get into these problems as to whether or not a particular return was filed properly or otherwise is that the Commissioner says the contract wasn't completed in December but was completed over in February and you got to file your return for 1943. The Commissioner is the one to object, and if the Commissioner looks at the records of the taxpayer and determines the thing is correctly reporting the income, the Commissioner is not going to object to the return. And what the taxpayer is saying here, "We made the mistake and we want [23] to change it, because it is going to be to our advantage to change it," not because the Commissioner has said the records as filed, the records as kept don't accurately reflect the income on this business.

The Court: By accepting the return, you say

the Commissioner tacitly agreed or tacitly took the position that the return as filed did correctly reflect the income?

Mr. Gillard: Yes, the taxpayer is trying to twist the thing exactly backwards from what the normal situation is and what is required by the regulations.

Secondly, I want to call your Honor's attention to the claim filed herein, and at this point, based upon the opening statement made by counsel, I will move for a judgment in favor of the United States based upon the pleadings and the opening statement of counsel are not in accord with the claim filed.

The Court: The claim as filed—is that attached to the complaint? I don't see it.

Mr. McKee: I think it is the last exhibit in the file, your Honor.

The Court: The claim itself was not attached as an exhibit to the complaint, but it is attached to the stipulation?

Mr. McKee: Yes, sir, I believe that's true.

Mr. Gillard: They are all the same, if the Court please. [24] The claim of John Daley, Exhibit 21, is the first one. That is the one I have in front of me, and I think it is probably the same.

The claim is filed, and the reasons given for it stated here:

> "The change in the amended partnership income tax returns is for the reason that erroneous returns were filed for the years 1942 and 1943.

"The amended returns as filed are consistent with the accounting procedure which was followed by Daley Bros. prior to 1942."

Now, that is very loose language, and what it means I am not quite certain. But this I am certain, that the necessary implication of that is that the original returns filed were not consistent with the original returns prior to 1942 filed by Daley Bros. and that these returns as filed with the amended complaint, they say, are consistent with the accounting procedures followed by Daley Bros. before 1942.

The essence of this thing and the essence of the complaint is that the returns as filed were on the accrual basis, that they made a mistake in filing them on the accrual basis, they should have been filed on a completed contract basis because the contract was completed in 1943.

Now, they are turning the thing around backwards, saying the returns as filed were actually filed on the completed [25] contract basis mistakenly, but that we now want to move the date forward for completion up until February instead of December. That statement is not consistent with the claim that the returns as originally filed were not consistent with the accounting method of Daley Bros. The only way you can read that language is that the returns as filed with the claim for refund were on the completed contract basis which was the type of accounting conducted by Daley Bros. prior to 1942, and the theory of the case as now presented by

counsel is just the opposite of what the theory of the case was as presented in that claim. [26]

* * *

JOHN P. DALEY

one of the plaintiffs herein, called as a witness in his own behalf; sworn.

The Clerk: Please state your name to the court.

The Witness: John P. Daley. [27]

* * *

Direct Examination

By Mr. McKee:

Q. What is your name?

A. John P. Daley.

Q. Are you one of the plaintiffs in this action?

A. Yes.

Q. What is your occupation?

A. I'm in the contracting business.

Q. How long have you been in the contracting business? A. Since 1921.

Q. Were you in business with your brother, Morris Daley, in 1942? A. Yes.

Q. Was that business conducted in the partnership form? A. Yes.

Q. When was that partnership formed?

A. In 1935, I believe. [28]

Q. Did you have a written partnership agreement prior to 1942? A. No.

Q. Did you know a Mr. William Radtke in Sep-

(Testimony of John P. Daley.)

tember, 1942? A. Yes.

Q. Did you have any conversation with Mr. Radtke at that time concerning the question of whether Mr. Radtke would participate with you and your brother in the conduct of your business?

A. Yes, I did.

Mr. Gillard: Pardon me. What was the date of that?

Mr. McKee: Did you have any conversation with Mr. Radtke at that time concerning the question——

Mr. Gillard: I asked you what the date was.

Mr. McKee: Excuse me. I didn't mention a date. "At that time," September, 1942.

Q. Do you remember any specific conversations?

A. There were a number of meetings, and it's a long time ago. I don't remember the specific conversation, but I remember the agreement that resulted from the conversations.

Q. Was that agreement oral or written?

A. It was oral.

Q. Can you tell us the terms, general terms of that agreement?

A. We agreed that Mr. Radtke would act as superintendent, field superintendent, for Daley Bros., and that he would receive one third of the net profits from the government work. [29]

Q. Was there any limitation as to the type of work in which Mr. Daley was—agreed Mr. Daley would participate with you? A. Mr. Radtke?

Q. Mr. Radtke. Excuse me.

(Testimony of John P. Daley.)

A. No, I think we agreed all of the new Army work, new Government work, would be shared by him.

Q. Did Mr. Radtke contribute any capital to your business upon becoming associated?

A. No, he did not.

Q. Who negotiated the contracts about which you speak? A. With Radtke?

Q. In which Mr. Radtke participated?

A. I did.

Q. Did you enter into any written agreement with Mr. Radtke at any later time than 1942?

A. Yes, toward the end of the year we confirmed an arrangement and reported progress in profits.

Q. Mr. Daley, I show you now a letter on Daley Bros. letterhead dated December 31, 1942, addressed to Mr. William Radtke and purporting to be signed by John P. Daley, Morris Daley and William Radtke, and ask you if you recognize those signatures? A. Yes, I do.

Q. Is this the agreement to which you referred?

A. Yes. [30]

Mr. McKee: I offer this in evidence, your Honor.

Mr. Gillard: No objection.

The Clerk: Plaintiff's Exhibit 1 introduced and filed into evidence.

(Whereupon letter dated 12/31/42 to William Radtke was received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of John P. Daley.)

The Court: Do you want to read it?

Mr. McKee: Yes, I would like to read it, your Honor.

PLAINTIFF'S EXHIBIT No. 1

"Mr. William Radtke
"462 Bryant Street
"San Francisco, California

"Dear Bill:

"We would like to set forth our understanding regarding our joint adventure arrangements in order that we may have an agreed settlement of our joint accounts to date.

"Our business arrangement has been a joint adventure, and we are figuring it as though we were winding it up on this date. As of this date your capital account is in the sum of $65,597.77, representing your share of the profits on the series of joint ventures we have engaged in up to this date. The sum is payable to you on demand subject to adjustments arising from any other joint adventures which we may have been or are currently engaged in. [31] No disbursement is to be made unless and until all contingencies between us and concerning any contracts we have been joint adventurers in are finally settled and disposed of. No interest shall be due or payable to either of us because of funds left in or placed in our operation of our joint adventures.

(Testimony of John P. Daley.)

"It is perhaps overdue that we reduce our arrangement to writing. We have continued under this arrangement and with the agreed basis for accounting, which has given rise to the foregoing credit figure on your behalf for a long time. It is probably good policy for our heirs in the event of the death of one of us that we arrive at this settlement and precisely fix the sum due you.

"Very truly yours,

"DALEY BROS.,

"By JOHN P. DALEY and

"MORRIS DALEY.

"Accepted and agreed to: William Radtke."

Q. Mr. Daley, I would like to ask you a question concerning one sentence in this letter. The sentence is this:

"As of this date your capital account is in the sum of $65,597.77 representing your share of the profits on the series of joint ventures we [32] have engaged in up to this date."

Mr. Daley, what are the joint ventures which are referred to in that sentence?

A. There were about seven relatively small contracts building barracks in the East Bay area, and there was a Japanese camp at Salinas and the Japanese camp at Delta, Utah.

Q. Did Mr. Radtke participate in all contracts which you entered into after he joined you in 1942? I am speaking now only of the year 1942.

(Testimony of John P. Daley.)

A. There was a small amount, under $10,000 of miscellaneous work that was not Army work, and that was as a result of the years of our acquaintance the years before.

Q. You stated that they were in the amount of $10,000. Is that the gross amount of the contract, or is that the profit?

A. That was the gross amount of the contract.

Q. Did Mr. Radtke participate in all contracts which you entered into in 1943?

A. Yes, he did.

Q. And in 1944? A. Yes.

Q. When did Mr. Radtke cease to participate with you and your brother Morris in the construction business?

A. In 1945, somewhere in the neighborhood of August.

Q. Mr. Daley, I show you now what purports to be a copy of the original Daley Bros. general partnership return for 1942; [33] I ask you if that is what it purports to be. A. Yes.

Q. Was the original of that return filed, and is that the copy except for the acceptances, the signatures? A. Yes.

Mr. McKee: I offer this return in evidence, your Honor.

The Court: Any objection?

Mr. Gillard: When was it filed?

Mr. McKee: I didn't ask him.

Mr. Gillard: Oh. May I have the filing date?

Q. (By Mr. McKee): Do you know when this

(Testimony of John P. Daley.)

return was filed, Mr. Daley, the original of this return?

A. No, I don't. I presume it was filed before March of the next year.

The Court: What is the purpose of that?

Mr. McKee: Your Honor, I wish to ask Mr. Daley the source of the items of income shown on this return in order to assist the Court.

The Court: Any objection to this?

Mr. Gillard: No objection

The Clerk: Plaintiff's Exhibit 2 introduced and filed into evidence.

(Whereupon copy of partnership return for 1942 was received in evidence and marked Plaintiff's Exhibit No. 2.) [34]

Q. (By Mr. McKee): Mr. Daley, there are two principal items of income shown on this return. The first one is gross profit from business or profession, $21,385.65. Can you tell us the source of that income?

A. That was income received from contracts signed up before the beginning of the war, jobs which had been completed after the first of the year and where the books were balanced and entered in this return from Daley Bros. previous work.

Q. The second principal item of income is in the amount of $38,160.32 from Daley Bros. Barracks Venture. Can you tell us what source that income was derived from?

A. That was income derived from the first group

(Testimony of John P. Daley.)

of Army contracts which we had, the miscellaneous small jobs.

Q. Did Mr. Radtke participate in those contracts? A. Yes, he did.

Q. I show you now what purports to be a copy of the original partnership return of income in the name of Daley Bros. Barracks Venture. I ask you if you recognize that for what it purports to be.

A. Yes.

Q. Was the original of that return signed by you?

A. I believe so; I signed, I think, all those.

Q. And was it filed on or about March 15, 1942?

A. Yes.

Mr. McKee: I offer this return in evidence. [35]

Mr. Gillard: No objection.

The Clerk: Plaintiff's Exhibit 3 introduced and filed into evidence.

(Whereupon partnership return for 1942, Daley Bros. Barracks Venture, was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. McKee): Mr. Daley, this return shows gross profit from business of $84,093.83. What does that represent?

A. That represents the income to the entire group, Radtke and Daley Bros., for the—that is the profit on the miscellaneous small jobs before the middle of the year.

Q. Does that include the Salinas job, the Salinas

(Testimony of John P. Daley.)

Relocation Center job also? A. Yes, it does.

Q. What was the Salinas Relocation Center job?

A. It was housing for Japanese at the Rodeo grounds. Is that what you meant?

Q. Yes. I show you now what purports to be a copy of the original 1942 federal income tax return of Daley Bros., limited partnership, and ask you whether you recognize it as such.

A. Yes, I do.

Q. And did you sign the original of that return?

A. Yes, I did.

Q. Was that filed on or before March 15, 1943?

A. Yes, it was. [36]

Mr. McKee: I offer this return in evidence.

Mr. Gillard: No objection.

The Clerk: Plaintiff's Exhibit 4 introduced and filed into evidence.

(Whereupon partnership return for 1942, Daley Bros., Ltd., was received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. McKee): Mr. Daley, this return shows gross profits from business of $131.76. Do you know what that represents?

A. That was non-government work which was carried on as a result of our former contracts.

Q. Did Mr. Radtke participate in those contracts? A. No, he did not.

Q. That return also shows income from the Daley Bros. Delta Venture of $144,166.96. What does that represent?

(Testimony of John P. Daley.)

A. That represents the profit on the contract for the Abraham Relocation Center at Delta, Utah.

Mr. McKee: Your Honor, I have here what I believe to be a copy of Exhibit 18 which you have in the file.

Mr. Gillard, may I question Mr. Daley with respect to this?

(Colloquy between counsel, inaudible to the reporter.)

The Court: That is a separate return, another one?

Mr. McKee: Yes, your Honor. [37]

The Court: You said that the Exhibit No. 4, limited partnership return, contained the same income as contained in the Delta Venture return?

Mr. McKee: No, your Honor, that exhibit contains the Daley Bros. share of the income as shown on the Delta Venture returns.

Q. Mr. Daley, I show you now a copy of Exhibit 18, which is on file with the partial stipulation of facts. That is a copy of the original partnership return of income filed in 1942—filed for 1942 in the name of Daley Bros. Delta Venture. This return shows gross profits from business of $206,250.44. What does that represent?

A. That represents the total amount of anticipated profit from the Delta Venture.

Q. Is that the Abraham Relocation Center?

A. Abraham Relocation Center.

(Testimony of John P. Daley.)

The Court: Are you going to offer that now so that you will have four complete returns?

Mr. McKee: If you would like me to——

The Court: I know it is here as Exhibit 18.

Mr. McKee: I will be very happy.

The Court: Have four of them together.

Mr. McKee: Yes, sir.

The Court: Be more convenient to look at them that way.

The Clerk: Plaintiff's Exhibit 5 introduced and filed [38] into evidence.

(Whereupon partnership return 1942, Daley Bros. Delta Venture, was received in evidence and marked Plaintiff's Exhibit No. 5.)

The Court: In other words, Exhibit 5 now is the taxpayer's copy of the return which is shown as a photostatic copy in Exhibit 18 attached to the stipulation?

Mr. McKee: That is correct, your Honor.

The Court: All right.

Q. (By Mr. McKee): Was any return filed for the Daley Bros. general partnership for 1943, Mr. Daley? A. No.

Q. Do you know why not?

A. Because we had a limited partnership which was operating which was doing the same thing, because we had organized the limited partnership to conduct the same business.

Q. Was any return filed in the name of Daley Bros. Delta Venture on or before March 15, 1944?

(Testimony of John P. Daley.)

A. No.

Q. Why not?

A. Because the tax return for 1942 showed it as completed.

Q. Was a return filed at some later time in the name of Daley Bros. Delta Venture?

A. Yes, it was.

Q. Why? [39]

A. Because we found that the work was not completed; as reported; until 1943.

Q. I show you now what purports to be a copy of the original Daley Bros. limited partnership return for 1943, and I ask you whether you recognize it as such. A. Yes.

Q. The only item shown anywhere on this return is a net loss from the Daley Bros. war department ventures. What were the Daley Bros. war department ventures?

A. That was a number of contracts with the Army Engineers, one at Tooele, Utah, one at St. John, Utah, one at Hamilton Field, and a number of other smaller ones.

Q. Was there any non-government work included in that return as income—from that return?

A. No.

Q. Did you do any non-government work in 1943? A. I think not.

Q. Did you file a 1943 federal income tax return in the name of Daley Bros. War Department Venture?

A. No, we did not. Wait a minute——

(Testimony of John P. Daley.)

Q. Well, let me put it another way. I show you now what purports to be a 1943 partnership return of income for Daley Bros. War Department Venture and I ask you whether that is what it purports to be? A. Yes, it is. [40]

Q. Was the original of that return filed by you on or before March 15, 1944? A. Yes, it was.

Q. Is that a copy of the original except for the lack of signature? A. Yes.

Mr. McKee: I offer this return in evidence.

Mr. Gillard: Which one?

Mr. McKee: Daley Bros. War Department Ventures for 1942.

Mr. Gillard: No objection.

The Clerk: Plaintiff's Exhibit 6 introduced and filed into evidence.

(Whereupon partnership return for Daley Bros. War Department Ventures for 1943 was received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. McKee): Mr. Daley, it has been stipulated that in July of 1942 a contract was entered into with the United States Government for the construction of a Japanese Relocation Center, the Abraham Relocation Center in Delta, Utah. What was the status of the work which you were called to do under that contract on December 31, 1942?

A. The work had not been accepted and there were a number of items, miscellaneous items, which

(Testimony of John P. Daley.)

were not complete such as the—I remember one particular—it has been a long time—the boiler room and boiler were not complete and none [41] of it had been accepted.

Q. Were there any matters in dispute between yourselves and the United States Contracting Officers in regard to the work being done under the Abraham Relocation Center contract on December 31, 1912?

A. Yes, there was a great deal of confusion over lumber billing. It is a rather complicated story, but the Army Engineers, the District Engineer at Salt Lake, because we were starting in on our program a month behind the other Japanese Relocation programs, had ordered lumber for us in anticipation of our getting the contract, or at least for the contractor who would get it, and after we started he diverted lumber from other contractors, later diverted our lumber to other contractors and did not keep particularly accurate records so that there was a matter of an estimated 11,000,000 feet of lumber needed for the camp and we had been charged with 13,000,000 feet. And I spent a tremendous amount of time in the next six months trying to account for that extra 2,000,000 feet of lumber which we had not used in the building itself—buildings themselves.

Q. How was that dispute finally resolved?

A. It was resolved on a compromise where we paid for a portion of it, but it was generally agreed that the Japanese tenants had used a great deal of

(Testimony of John P. Daley.)

it in building furniture for themselves. We paid for a portion of it, and it came off of our profits. [42]

Q. As a partner of Daley Bros. did you have control and general supervision over the books of account in which were recorded the accounting entries concerning the various contracts you have testified about this morning? A. Yes.

Q. And did you also have control over the books in which were recorded the contracts entered into by Daley Bros. in 1941? A. Yes.

The Court: Well, perhaps we might take a brief recess at this time.

(Short recess.)

Q. (By Mr. McKee): Are these the books which were used in '41, '42 and '43 (indicating)?

A. Yes.

Mr. McKee: I offer these books in evidence.

The Court: Well, now, that's a big order, isn't it, counsel? If there is something like that offered in evidence I am not going to read all those books.

Mr. McKee: No, your Honor. It is possible, however, that we would refer to certain particular items or accounts in the books.

The Court: Why don't you mark them, identify them—mark them for identification, and then if you want to refer to something in the books they could be specifically included in the record. [43]

Mr. McKee: May I do that then, your Honor? May I ask these books be marked for identification?

(Testimony of John P. Daley.)

The Court: Do you want to identify them specifically?

Mr. McKee: As a group exhibit.

The Court: All we have on the record is that there are four books.

Mr. McKee: May I ask that they be identified separately but without specifically referring to just what each book is?

The Court: Well, the three books——

Mr. McKee: Four books, your Honor.

The Court: Mark them 7, 8, 9 and 10 in order.

The Clerk: Plaintiff's Exhibits 7, 8, 9 and 10 marked for identification.

(Whereupon books of account referred to above were marked Plaintiff's Exhibits Nos. 7, 8, 9 and 10 for identification.)

Q. (By Mr. McKee): Mr. Daley, did you ever instruct your bookkeeper or accountant to open new books of account when Mr. Radtke joined your business? A. No, I did not.

Q. Who was your accountant in 1941, 1942 and 1943?

A. George Cotterrill, C-o-t-t-e-r-r-i-l-l, was our bookkeeper on full time, and Sam Rosenblatt was our consulting C.P.A.

Q. How long had Mr. Cotterrill been with you? [44] A. Since 1931.

Q. It has been stipulated that from the time of its organization to 1942 that Daley Bros. re-

(Testimony of John P. Daley.)

ported its income from construction contracts on the completed contract method.

Mr. Gillard: Just a minute. That is the portion of the stipulation which I object to as incompetent, irrelevant and immaterial. I object to that question as incompetent, irrelevant and immaterial; it is a statement.

Q. (By Mr. McKee): Did you, Mr. Daley, assume——

The Court: Say what? What was the last thing?

Mr. Gillard: I said I assumed the statement wasn't in the form of a question, but I objected to the form of the question to the witness on the ground that the objection——

Mr. McKee: It is in the stipulation, your Honor.

Q. Did you, Mr. Daley, or anyone with your knowledge ever make a request with the Commissioner of Internal Revenue on behalf of the general partnership or limited partnership or of any special partnership in which you or your brother and Mr. Radtke were interested that you be permitted to change the method of reporting income?

A. No.

Mr. Gillard: I move that the answer be stricken until the objection is made. I object to that as incompetent, irrelevant and immaterial. There has been no showing there was any basis for a request to the Commissioner to change the [45] method of accounting for a new entity. There is no requirement in the law. It is a legal question involved, and object on the ground there is no basis for showing

(Testimony of John P. Daley.)

there is any requirement made to change the method of accounting for a new entity.

The Court: Well, if it would become material, the fact would be in the record, and it may not have any evidentiary weight. That's all. Isn't that correct?

Mr. McKee: I don't think so, your Honor. It is our contention that as a matter of law a business with the background that has been revealed in the facts here may not change its method of reporting income without the consent of the Commissioner, and I think it is material to our case to determine whether permission was ever granted by the Commissioner to change the method of accounting.

The Court: It would only be material if there was some changed method of reporting, isn't that so? Otherwise, how would it be material?

Mr. McKee: Well, I think you are right, it is anticipatory evidence.

The Court: It is purely an academic question you asked the witness now. It would only become material if there was some factual matter shown that would make it material.

Mr. McKee: Your Honor, I would not want to be estopped on some theory that the taxpayer reported his income as [46] required by law if it should be concluded that this income was reported on an accrual basis; I would want to show that in fact the taxpayer never requested a change of the Commissioner of Internal Revenue, and was required.

(Testimony of John P. Daley.)

The Court: That is kind of far-fetched, isn't it?

Mr. McKee: It may be, your Honor.

The Court: I don't think that is material to this controversy.

Mr. McKee: In 1943 and subsequent years in which you have been engaged in the contracting business, Mr. Daley, have you consistently followed the practice of reporting income for tax purposes only when the contract was completed?

A. Yes.

Mr. Gillard: May I ask that the answer go out?

The Court: It may go out.

Mr. Gillard: Object to that as incompetent, irrelevant and immaterial as to what happened after 1943 and subsequent years.

The Court: I don't see the materiality of that, counsel.

Mr. McKee: Your Honor, one of the issues in this case is whether any method other than the completed contract method would clearly reflect the income. Mr. Daley is a contractor who has been in the contracting business for some 35, 36 years, and I think he is familiar with the problems in the construction contracts which indicate that the profit [47] cannot be known until after the contract is completed.

The Court: I don't see how your question would have any materiality as to whether Mr. Daley in subsequent years——

Mr. McKee: I think I see your point——

The Court: ——reported his income. There

(Testimony of John P. Daley.)

might be any number of reasons for it. I will sustain the objection.

Q. (By Mr. McKee): Mr. Daley, in the contracting business do you frequently find that you can't determine the total profit from your contract until the contract is completed?

A. Yes, that's perfectly true because until acceptance of the work you don't know whether you have to do any portion of it over again, and it is almost impossible to determine whether you have made any profit until actual acceptance of the work.

Q. In the contracting business is it the general practice to—what is the general practice with respect to the payment of the contract price as the work progresses?

A. There are all sorts of——

Mr. Gillard: Just a minute. I don't know that I quite understand the question, but I am going to object on the ground there has been no foundation laid.

The Court: That is a pretty big question you are asking him, general practice in all the contracting business.

Mr. McKee: I don't have any further questions, Mr. Daley.

(Testimony of John P. Daley.)

Cross-Examination

Mr. Gillard: Mr. McKee, you referred to a 1943 income [48] tax return for Daley Bros., Ltd., which you showed to the witness. Was that marked for identification or put in evidence?

The Court: It wasn't marked.

Mr. McKee: The witness has it.

The Court: You showed him two documents, but you only offered the one.

Mr. McKee: I am sorry.

The Court: You only offered the 1943 Daley Bros. War Department Venture return.

Mr. McKee: That was an oversight, your Honor. May I offer the 1943 Daley Bros. limited partnership in evidence?

The Clerk: Plaintiff's Exhibit 11 introduced and filed into evidence.

(Whereupon 1943 Daley Bros. limited partnership return was received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Gillard): Mr. Daley, as I understand this situation, you entered into a partnership or an oral understanding or partnership arrangement with your brother in 1935?

A. That is right.

Q. At that time was a certificate of doing business under a fictitious name filed with any county clerk? A. No.

Q. Or county recorder? [49] A. No.

(Testimony of John P. Daley.)

Q. Was a certificate by you and Morris Daley doing business as Daley Bros. ever filed?

A. No.

Q. At any time?

A. I don't remember of it ever having been filed. I don't think it was.

Q. Now, in 1942 a certificate of limited partnership was filed showing as general partners yourself and your brother Morris and Homer Bosse as a limited partner?

A. I don't know. I think it was; I am not sure.

Q. Were you aware of that fact, sir?

A. I don't know.

Mr. Gillard: Will you stipulate to that, Mr. McKee, or shall I get the records from the recorder's office over here?

Mr. McKee: I will stipulate to it there was; I have no personal knowledge of that.

Mr. Gillard: A check of our record shows, and I will state the facts for the record, that on July 6, 1942, a certificate was filed showing that John Daley and Morris Daley, as general partners, and Homer Bosse as a limited partner, doing business under the name of Daley Bros., Ltd., was filed with the county recorder in the City and County of San Francisco.

Mr. McKee: I will stipulate to that. [50]

Q. (By Mr. Gillard): Did you ever file any certificate of doing business under a fictitious name which included William Radtke?

A. Not that I know of.

(Testimony of John P. Daley.)

Q. At the time of the formation of the new limited partnership in 1942 was the partnership consisting of John Daley and Morris Daley still in existence? A. Yes.

Q. And did it continue in existence thereafter?

A. No, the same set of books was used and the ledger taken over by the limited partnership, the entire business taken over, treated as if it were the same business.

Q. In what fashion was the partnership of John and Morris Daley dissolved?

A. I don't know of any such action taken for dissolution.

Q. No acts were taken at all, were they, Mr. Daley? A. I don't think there was.

Q. In 1941 was there anybody sharing profits with you and Morris Daley in the Daley Bros. enterprises? A. No.

Q. I will show you a photostatic copy of a partnership return for the calendar year 1941—I got the original of this from you, counsel. Perhaps it might be better if I were to show you the original office copy, if Mr. McKee wants to produce it.

Mr. McKee: I have it, but I am not sure I brought it [51] along. I will be glad to stipulate that's a copy of it.

Q. (By Mr. Gillard): I will show you instead, sir, your office copy of that same return. Does that appear to be a copy of a return filed by Daley Bros. for the partnership return—partnership return for

(Testimony of John P. Daley.)

Daley Bros. for the calendar year 1941 and presumably filed on or before March 15, 1942?

A. Yes.

Q. And that shows distribution of income only to Morris Daley and John Daley? A. Yes.

Q. And it shows it was prepared on a cash basis?

Mr. McKee: I think the document speaks for itself, your Honor.

Mr. Gillard: I will offer it in evidence.

The Court: Pardon me?

Mr. Gillard: I will offer that in evidence as the Government's first exhibit in order.

The Clerk: Defendant's Exhibit A introduced and filed into evidence.

(Whereupon 1941 return, Daley Bros., was received in evidence and marked Government's Exhibit No. 1.)

The Court: Apparently you put an X opposite "Cash" on the return. I presume that is what you refer to in showing it was prepared on a cash basis? [52]

Mr. Gillard: Yes, sir.

Q. Now, sir, with reference to William Radtke——

Mr. McKee: If I may, your Honor, I would like at this time to move that the portion of the 1941 return showing that it was prepared on a cash basis be disregarded on the grounds it is inconsistent with the stipulation of facts stating that it was on the completed contract method.

(Testimony of John P. Daley.)

The Court: Stating that what?

Mr. McKee: Stating that the return was filed on the completed contract method. It has been stipulated to between counsel the tax returns were prepared on the completed contract method.

Mr. Gillard: The stipulation is subject to objection as to incompetency, irrelevancy and immateriality.

The Court: Well, I will relieve you from the stipulation, if it is necessary. I am not going to decide the case on the basis of some stipulated fact if it is inaccurate—if it appears it is inaccurate.

Mr. McKee: Pardon me, your Honor?

The Court: If it happens something in the stipulation is inaccurate, I will relieve the parties of the stipulation to that effect. We are not playing a football game, whatever the fact is. Somebody made a mistake, maybe.

Mr. McKee: Well, your Honor, I think the assumption will be the other way around that the mistake was made in marking [53] the return on the cash basis because——

The Court: What is your position with respect to this stipulation?

Mr. Gillard: Well, the stipulation is subject to objection on the grounds of immateriality, and I would so object to that portion of the stipulation as the Court indicates.

The Court: You mean since there has been evidence offered on that subject that you want to offer evidence on it also?

Mr. McKee: Your Honor, if that stipulation is

(Testimony of John P. Daley.)

immaterial, then the return is immaterial. The stipulation provides that no inconsistent evidence may be submitted, evidence which is inconsistent with the stipulation.

Mr. Gillard: I don't think it is material and I'll stipulate that that portion of the return showing the basis upon which it was filed may be disregarded or may be ignored and blocked out.

The Court: All right.

Q. (By Mr. Gillard): Mr. Daley, with reference to William Radtke, as I understand your testimony, you first met him some time in the early part of 1942? A. Oh, no.

Q. At least for the purposes of forming any business associations with him?

A. Yes, I had known him since 1913, but we talked to him in early 1942. [54]

Q. About conducting or sharing with you in the development of these War Department contracts you were securing? A. Yes.

Q. And at that time you entered into an oral arrangement with him on a joint venture basis?

A. We agreed that we would let—we would give him one third of the net profits—what the technical definition is, I don't know—in exchange for his acting as field superintendent.

Q. For what length of time was that oral agreement to run? A. Until it was cancelled.

Q. By either party?

A. (Witness nodding.)

Q. Between that time—and that was in Febru-

(Testimony of John P. Daley.)

ary of 1942, sir? A. Yes.

Q. Between that time and the end of 1942 were the terms of that oral understanding changed?

A. No. There was an exception in that the limited partnership took the place of the general partnership, but we considered it as one business.

Q. Wasn't the percentage Mr. Radtke was to have on the Delta contract different than the percentage he was to have on the prior Barracks contracts? A. No.

Q. Wasn't the agreement to share profits with Mr. Radtke [55] changed at the time that the Delta contract was secured from 33⅓ per cent to 30 per cent? A. No.

Q. Wasn't your return for the Daley Bros. Delta Venture prepared showing distribution of profits to Radtke of 30 per cent of the net profit?

A. No.

Q. That is not a fact, sir?

Mr. McKee: I think the return, which is in evidence, speaks for itself.

A. There was never any change in the agreement. If it were reported in that way, it was in error. We had no change in our agreement.

Q. (By Mr. Gillard): Perhaps you can tell me, then, Mr. Daley, if your relations with Mr. Radtke were the same throughout 1942, why two separate partnership returns were filed, one for the Daley Bros. Delta Venture and one for the Daley Bros. Barracks Venture?

A. Because Daley Bros. were changed to a—or

because we took in Homer Bosse as a limited partner. The businesses were run the same, with the same books, but we took Homer Bosse in as a limited partner.

Q. Wasn't that situation taken care of by filing a separate return for Daley Bros., Ltd., as distinguished from Daley Bros. general [56] partnership?

A. Well, the Delta Venture was a partnership between William Radtke and the limited partnership, where the other was the Delta partnership.

Q. Regardless of the presence of Mr. Bosse, in Daley Bros., the share of Daley Bros. with Mr. Radtke, under your testimony, was the same under the Barracks Venture as it was under the Delta Venture, is that correct? A. That's correct.

Q. And you say the returns will so show?

A. I would say that if the returns don't show that in my estimation they would be in error because there was no change in the agreement with Radtke.

Q. And if those returns are wrong, then it is your indication that——

A. There is an error made in the return.

Q. You owe Mr. Radtke some money?

A. Perhaps.

Q. Now, sir, on Exhibit 4, that is the return of Daley Bros., Ltd., for the year 1942, there is a return of miscellaneous income of $18,068.95, which apparently is broken down into various amounts, equipment, rental, $13,151.00; discounts, $4,274.00,

(Testimony of John P. Daley.)

and insurance and payroll charges, $642.00. Do you recall those items, sir? A. Been a long time.

Q. I will show you my copy of that return, [57] sir.

A. I believe that those are items——

Q. Let us focus our attention on that item for equipment rental, Mr. Daley. Wasn't this the factual situation, that that equipment was owned by Daley Bros., Ltd.? A. Yes.

Q. And it was rented to Daley Bros. Delta Venture for the purpose of doing this work at Delta, Utah?

A. I believe it was. I think that Radtke, that in our agreement Radtke rented his own equipment also. I think we had an agreement that the individually owned equipment was charged into the partnership on the basis of the allowable rentals at the time, because, as I remember it, some time during the contracts Radtke also put some of his personally owned equipment into the work on a rental basis.

Q. Well, that wouldn't be covered by this return for Daley Bros., Ltd., would it?

A. Yes, Daley Bros., Ltd., took over all the assets of Daley Bros.

Q. Yes, but Daley Bros., Ltd., wouldn't be returning any profits on rentals by Radtke?

A. Oh, no, I say Radtke had—I think Radtke will show on his return——

Q. Let's stay with this return, if you will, sir.

(Testimony of John P. Daley.)

A. Yes, we charged to the partnership rental on equipment individually owned. [58]

Q. And what you mean by that is that Daley Bros., Ltd., consisting of yourself and Morris Daley and Homer Bosse, rented to Daley Bros. Delta Venture, consisting of yourself and Morris Daley and Homer Bosse and William Radtke, certain equipment for which it charged a rental and on the account for which showing that income certain charges for maintaining that was concerned and the profit from that transaction is reflected upon this return for Daley Bros., Ltd.

A. I presume that's the case.

Q. That is the case, sir, isn't it?

A. I think so, yes.

Q. Now, sir, do you know the dates when these partnership returns were prepared, Exhibits 2, 3, 4 and 5?

A. No, I would be guessing. I presume it was after the closing of the books.

Q. On Exhibit 5, the gross receipts from the business or profession, you reported there a figure of $3,655,672.28. That was the total amount received, or to be received under the contract with the change orders for this Delta job; is that not correct, sir?

A. Not necessarily. That was the estimated amount because we didn't determine the actual amount until July of the next year.

Q. I see. You based that estimate on the original contract price plus the additions and deductions by

(Testimony of John P. Daley.)

virtue of the [59] supplemental agreements and change orders?"

A. We guessed at what the profit would be, I didn't guess——

Q. I didn't ask you about the profit, sir. I am talking about the gross receipts.

A. The gross receipts?

Q. Yes, sir.

The Court: You didn't have to guess about that because you knew what they were.

The Witness: I don't know whether that reflected accounts receivable or not, whether that was actually—I don't think it was the amount we had received because a lot of it was held back for final payment.

The Court: Well, what this lawyer wants to know was whether or not that amount was the gross amount of the payments theretofore received or to be received under the contracts, plus the additions and changes.

The Witness: I presume it is.

Q. (By Mr. Gillard): I will refer you, sir, to Exhibit 20, which is attached to the stipulation on file herein. That return, Exhibit 20, was filed at the same time that your claim for refund was filed on March 15, 1947, was it not, Mr. Daley?

A. I believe so.

Q. And that return on page 2 thereof shows gross income from the contract per return filed in 1942, $3,655,672; is [60] that not so?

A. That is what it shows.

(Testimony of John P. Daley.)

Q. So that in 1947 you had confirmed from your books that the return made in 1943, that is, Exhibit 5, correctly reflected the gross amount of the income from this contract on that Delta, Utah, work; is that not true?

A. I am afraid you missed me.

Q. I will show you Exhibit 5 again, which is your return filed for the year 1942.

A. Yes, this says per return filed in 1942, the same amount as is shown on the report of '42.

Q. That is correct, and that subsequent return, Exhibit 20 to the stipulation of facts, was filed in 1947?

A. And the reported—that this was the amount reported in 1942, yes.

Q. No correction was made in the amended return filed in 1943 of that amount, was there, sir?

A. I don't know.

Q. Except for the renegotiation amount set forth on page 2 of the return itself.

Isn't it true, Mr. Daley, that in filing your return for 1943 for Daley Bros. Delta Venture, what you were doing was trying or attempting to file a return transferring the entire income and profit from the Delta Venture from the year 1942, as originally returned, into the year 1943? [61]

A. No, it was the purpose of filing a new return, was to show the facts, that we filed in error.

Q. And the fact was that by this return you were reporting the entire income of that contract for 1943, is that correct? A. That's correct.

(Testimony of John P. Daley.)

The Court: In 1943 for the year——

Mr. Gillard: For the year 1943.

The Witness: That is correct.

Q. (By Mr. Gillard): That return was filed in 1947, is that correct? A. That is correct.

Q. And in 1947 per that return in your hand, Exhibit 20 of the stipulation, you reported that the gross income from that contract was $655,672 less the amount of the renegotiation refund; is that correct?

The Court: Three million.

Q. (By Mr. Gillard): $3,655,672: is that correct? A. Yes, $3,620,000 and so forth.

Q. And that is the same figure, sir, as reported on the 1942 return, is it not?

A. No, $3,655,000.

Q. Well, let's start again. On page 2 you report the income from this contract as $3,655,672 less the renegotiation refund, is that correct? [62]

A. Yes.

Q. All right. You did not change the gross amount of the contract receipts as reported in your 1942 return, did you? A. Apparently not.

Q. All right. Now, sir, change order No. 11 to this contract is dated February 4, 1943, and increased the contract sum by $5,639.79—under the stipulation of facts—is that correct, sir?

A. It's been so long I don't even know. I don't remember.

The Court: Well, he has correctly stated that.

The Witness: I presume.

(Testimony of John P. Daley.)

The Court: You can take that for granted.

Q. (By Mr. Gillard): And the supplemental agreement modification No. 13, dated February 15, 1943, increased the contract by $2,090.85.

A. I presume that was done.

Q. Well, sir, those two amounts, totalling a little over $7,000, were included in the gross contract receipts reported in your 1942 return, were they not?

The Court: He means by that those two figures were a part of that $3,655,000 figure.

The Witness: I am sure the books are a better source of information than my memory. I presume that that is correct.

The Court: I would think it would be because when you [63] filed this amended return in 1947, that was many years afterward, so that of course it would have included in the total gross amount all the amounts you received under the contract. I would think that would be so.

Q. (By Mr. Gillard): Now, sir, having your recollection refreshed by this modification order No. 13, dated February 15, 1943, can you tell me when the return was prepared for the calendar year 1942?

A. No, I can't.

The Court: Well, I think we can pretty well assume it must have been prepared after that date; don't you agree, counsel?

Mr. McKee: After the date of the supplemental change order?

The Court: Yes.

(Testimony of John P. Daley.)

Mr. McKee: Well, I don't know. Perhaps that can be assumed.

Mr. Gillard: Would this be a convenient time to take a recess?

The Court: All right. I have to take the report of the grand jury. We will recess until 2:00 o'clock.

(Thereupon, an adjournment was taken to 2:00 o'clock p.m.) [64]

Afternoon Session, September 28, 1955

JOHN P. DALEY

resumed the stand; previously sworn.

Cross-Examination
(Continued)

By Mr. Gillard:

Q. Mr. Daley, Exhibit 1 in evidence is a copy of a letter to Mr. Radtke—call it a duplicate original—with reference to his account on December 31, 1942. A. Right.

Q. Was that letter written on December 31, 1942?

A. I have no reason to believe that it was not. I really don't know.

Q. And was that supposed to be the amount of the credit standing to his accounts at the end of 1942? A. Yes.

Q. And that would include his profit from the Delta Venture as well as from the Barracks Ven-

(Testimony of John P. Daley.)

ture? A. I presume so.

Q. That would include any drawings that he had during the year against that account?

A. I think that only includes the profit that hadn't been distributed. We had drawings—we all had salaries which we drew against the cost of the projects.

Q. And that would not have been reflected in that figure you put there, is that correct? [65]

A. I think not.

Q. Then would that include that figure, $65,000—did that include the total amount of the distributable profit to him on the Delta job?

A. I believe it would include every—our concept at the time of all of the profit, his share of the profits on all of the government work.

Q. You recall this morning we were talking about change orders 11 and 13 on the contract which were made in February of 1943. With that in mind, would you say that letter was issued on December 31, 1942?

A. That was issued on the basis of approximating the amount of profit made on the contract. The contract wasn't done.

Q. Would the amount of profit shown there on that account, that letter, total the amount of his distributable shares in both the Delta Venture and the Barracks Venture?

A. I believe so. That's what our accountants said was the case. I didn't personally keep the books.

Q. I will show you Exhibits 3 and 5 in evidence.

(Testimony of John P. Daley.)

On the last page, on the back page of each one of those, you see the distributions of profits from each venture. The Barracks Venture shows the distribution to Mr. Radtke of $19,000 and some odd, and the Delta Venture, $62,000-some odd. Your Exhibit 1 shows a total credit of $65,000. Could it be that that letter of December 31 refers only to the Delta contract? [66]

A. I think this referred to all of the operations for the year. However, I think it was only an approximation because we didn't know what the profits were.

Q. Don't your books reflect the capital accounts at the end of 1942 in accordance with Exhibit 3 on the Delta return?

A. I imagine they do, but it doesn't necessarily mean they reflect the truth as to how much we made on the contracts.

Q. Don't the books reflect exactly the figure you have got there on that partnership return showing distribution of profit to you and the Radtkes?

A. I presume they do.

The Court: Well, this $65,597 was the amount you figured was due December 31. It is an odd amount. It must have been figured by the accountants, but it was subject to the settlement of any joint venture accounts that you had. In other words, it is correct, isn't it, that that was the figure that was accurately and precisely arrived at of the amount payable to Radtke, subject only to such ad-

(Testimony of John P. Daley.)

justments as might result from some final settlement of the various joint venture accounts?

The Witness: I think that is correct. It was our belief—the reason for it——

The Court: It wasn't any estimate. The reason I asked the question, it is obvious it wasn't an estimate because it [67] was figured down to the last penny.

The Witness: No, but the profits——

The Court: That is what it figured at that time.

The Witness: That's right. The profits shown on the Delta Venture was an estimate because the work wasn't completed. We did that because——

The Court: That's a legal argument you are making now. But the point is, it is true, isn't it, that the accountants figured that amount as the amount then due. He could draw on that subject to his payment on demand, but it was subject to adjustments in connection with the accounts that future events might make it necessary to bring about. That is actually what was done.

Mr. McKee: Undoubtedly it was a figure not to be drawn on.

The Court: Well, I didn't mean to interrupt. Go ahead.

Q. (By Mr. Gillard): Mr. Daley, this morning we were discussing Exhibit 4, which is the partnership return for 1942 on Daley Bros., Ltd., and I asked you about the additional income of $18,000 under Item 14. On Item 1 of that return there is

(Testimony of John P. Daley.)

other income in the gross amount of $1,539 with a net of $131. Can you tell me what that business is?

A. This is—I presume that it was a small amount of business that we did as a carry-over from the previous year, not government work. We had a number of customers who asked us [68] to service their buildings occasionally, and without going into the facts, I would presume that is the case.

Q. This is the return of Daley Bros., Ltd., is that correct? A. Yes.

Q. Formed in July of 1942? A. Yes.

Q. And it is your best guess that that income is from work that was done after July 6—whatever the date of that partnership agreement is?

A. I think so.

Q. After July 6, 1942? A. Yes.

Q. And that would be work in which William Radtke would not share?

A. That's right. It was work in connection with our non-government customers of the previous period.

Q. Therefore that income could not be returnable upon either one of the Daley Bros. joint venture returns with William Radtke?

A. That's right.

Q. Similarly, I show you a copy of Exhibit No. 2, which is Daley Bros., general partnership return, which shows on item 3 a profit figure of $21,300-some-odd. Can you tell me where that income came from? [69]

A. Yes, that was income which had been, which

(Testimony of John P. Daley.)

was the result of contracts that had been started in the previous year, but which were not reported because of our complete contract basis of reporting.

Q. Now, when you say "in the previous year," you refer to Daley Bros.? A. Right.

Q. That is John and Morris Daley?

A. Right.

Q. And that was work in which William Radtke did not share? A. That's right.

Q. Therefore the continuation of that work and the completion of that work in 1942 was reportable only on the general partnership return and not upon either one of the joint venture returns?

A. That's right.

Q. Tell me, sir, inasmuch as the limited partnership was not formed until July of 1942, how was it doing work in 1941 which was carried over onto the Exhibit 4 return for the limited partnership?

A. The only explanation I can give is that we conducted all of our business on the basis—we started business in—I started business in 1922 and we operated as Daley Bros. During that period we changed from partnership—I had another brother who was a partner—we changed to a [70] corporation, we changed back to a partnership, we changed to a limited partnership, and as far as the public is concerned, it was always done as Daley Bros. We had a number of reorganizations but always the work was conducted as Daley Bros., and aside from the agreements with Radtke and so on,

(Testimony of John P. Daley.)

as far as our customers are concerned, and as far as our suppliers are concerned, it was Daley Bros.

Q. We are just talking about 1941 and 1942, Mr. Daley. In 1941 what was in existence?

A. Daley Bros.

Q. John and Morris Daley? A. Right.

Q. And that's all that was in existence?

A. Yes.

Q. And the limited partnership was not in existence? A. Right.

Q. So any work that was done in 1941 to the account of Daley Bros. was John and Morris Daley partnership? A. Right.

Q. Now, if that is the situation as you describe, why wasn't this income reported on Exhibit 4-to the Daley Bros., Ltd., partnership which you say was for work, that item of $1,539, that was work done in 1941? Why wasn't that reported on the return of Daley Bros. general partnership?

A. Because I personally always considered that the [71] limited partnership had taken over all the assets and liabilities of the general partnership, and we made no differentiation in our method of doing business. It may have been in error, but that was the way we considered it.

Q. Then if that was the situation, why wasn't the $21,000 reported on the general partnership return reported on the limited partnership return?

A. Unquestionably the portion reported on the general partnership return was that portion reported in the first half of the year before there was

(Testimony of John P. Daley.)

the limited partnership. The second portion was reported upon that portion of the work which was completed in the second half of the year.

The Court: When were these trusts set up?

The Witness: In July.

The Court: The same time the limited partnership was formed?

The Witness: That is right; that was the purpose of the limited partnership.

The Court: The answer is probably there is some relationship between them, the reason that particular amount of money was put in a particular return that it was put in.

The Witness: There was no operation as such of a general partnership after the limited partnership was organized, I believe.

Q. (By Mr. Gillard): Mr. Daley, were your relations with [72] Mr. Radtke, or were the relations —I say "you"; I mean you or the limited partnership or the general partnership—the same in 1943 as they were in 1942?

A. Yes, with a possible exception of adjustments for equipment rental from individuals or for drawing accounts—that is, salaries. As far as the distribution of the profits is concerned, there was no change.

Q. But the general relationship with reference to a profit-sharing arrangement under the control of Daley Bros. in acting as field superintendent or manager was the same in both 1942 and 1943?

A. Yes.

(Testimony of John P. Daley.)

Q. So consequently in 1943 a joint venture return, which is Exhibit 6, Daley Bros. War Department Venture, in that same year there was filed Exhibit 11, Daley Bros., Ltd., and those two returns stand in the same relationship to each other as the 1942 returns for the joint venture stand with relation to the partnership returns; is that correct?

A. I believe that's correct. It's a little involved, but I think I understand what you meant.

Q. Well, the joint venture in each and every case, then, was considered as a separate entity, was it not, separate and distinct from the Daley Bros., Ltd., or Daley Bros. partnership?

A. No, the joint venture was not considered separate. The [73] joint venture was simply a method of paying Radtke his share of the net profits. As far as the public was concerned, as far as the Army was concerned, all of the contracts were signed by Daley Bros.

Q. Yes, but as far as you were concerned in your bookkeeping and in your income tax partnership returns, you treated these joint ventures with Radtke, the Barracks Venture in '42, the Delta Venture in '42, and the War Department Venture in '43 as separate entities, did you not?

A. As far as the tax returns were concerned, they were treated separately because it was necessary for a separation of the old work and from the portion of the work that Radtke was not involved in.

The Court: You didn't have to do it, Mr. Daley.

(Testimony of John P. Daley.)

It wasn't tax law that required you to file these separate returns, was it?

The Witness: I don't know. I am not a tax expert.

The Court: Well, perhaps it's not right to ask him that question. Go ahead.

Q. (By Mr. Gillard): In your concept of this entire arrangement, you dealt with the Daley Bros. Delta Venture as a separate and distinct entity from Daley Bros., Ltd., did you not, both in your books and on your tax returns?

A. No, as far as the operation of the business was concerned, there was no difference. As far as the tax return [74] were concerned, the purpose—I don't know; I didn't make them out, but the reason for that was explained at the time as being the correct way to put it in the return, and, frankly, I am not a tax expert and I don't know.

Q. In 1943 didn't you treat the joint venture with Radtke, the War Department Venture, as a separate entity from Daley Bros., Ltd.?

A. Separate return made, yes.

Q. Well, it was a separate entity, a complete different unit, complete different people, complete different objectives and everything else?

A. The only purpose that I know of for that was there were drawing accounts, there was equipment rental which justly belonged to Morris and me, also some which belonged to Radtke. So we had a different income than the joint venture on the

(Testimony of John P. Daley.)

partnership return, the Barracks Venture and the Army Venture.

Mr. Gillard: Will you mark this for identification?

The Clerk: Defendant's Exhibit B marked for identification.

(Whereupon, letter of 11/15/44 was marked Defendant's Exhibit B for identification.)

Q. (By Mr. Gillard): Mr. Daley, I show you Defendant's Exhibit B for identification, which is a letter dated November 15, 1944, signed by you and directed to Mr. F. M. [75] Harless, Internal Revenue Agent in charge in San Francisco, and direct your attention only to page 7 thereof. Although this letter deals with several matters, this is a separate subject starting with the words, "The examiner's report." Is that your signature on page 7, Mr. Daley? A. Yes, it is.

Q. And on the following page there is a notarial acknowledgment of your signature? A. Yes.

Mr. Gillard: I will offer in evidence pages 7 and 8 of the document, page 7 commencing with the words I indicated, if the Court please, which started with the third paragraph.

Mr. McKee: Your Honor, I am going to object to the introduction of this in evidence unless the entire document goes in. I don't believe that pages 7 and 8 can be read alone. There are eight pages—seven pages which are signed, one signature by John Daley. I believe that the matter which counsel

(Testimony of John P. Daley.)

intends to introduce in evidence, if put in alone, would be out of context.

Mr. Gillard: The Court can examine the document for that purpose: This deals with a separate subject and I think what I was going to read to the Court is clear enough. If there is something else relevant in the document that counsel wants to put in, he can make his motion at that time. [76]

The Court: Where did you start?

Mr. Gillard: Starting with the words, "The examiner's report," the second paragraph from the bottom.

The Court: Well, all of the first part of this letter has to do with is an argument that the income of a partner—established this limited partnership—and under these trusts is not income of the general partnership.

Mr. McKee: That's right, your Honor.

The Court: What has that got to do with this?

Mr. McKee: Page 7, which he intends to put in evidence, is part of that argument. In addition——

The Court: No. Page 7 is an additional item, an additional proposal of the examiner to add to the partnership income for 1943 an equipment rental income and explaining why that should not be added to the partnership income, pointing out that—pointing out the circumstances under which it was incurred, and that is a charge against the separate joint venture account, and the reason for it is set forth in the letter. There is no jury present. I don't see that it adds anything, has any relation-

(Testimony of John P. Daley.)

ship to this particular matter. There is no question involved here of the validity of this trust.

Mr. McKee: All right.

The Court: Or the relationship of the income tax to the—— [77]

Mr. Gillard: That is a matter which is a separate administrative matter and settled between the parties.

The Court: The whole letter is offered for identification. The particular portion may be admitted, the particular portion on Page 7.

Mr. Gillard: Page 7, the last two paragraphs on page 7? Thank you, your Honor.

May we substitute for that, if the Court please, a typewritten copy of the same, since this is an original document and return it?

The Court: Very well.

Mr. Gillard: Is that all right, counsel?

Mr. McKee: Yes, certainly.

(Whereupon: portion of letter referred to were received in evidence as Defendant's Exhibit B.)

DEFENDANT'S EXHIBIT B

* * *

The examiner's report errs also in proposing the addition to the partnership's income for the calendar year 1943 of $5,121.86, based on an adjustment of the "equipment Rental" account. This adjust-

(Testimony of John P. Daley.)

ment should, however, be charged to the joint venture of Daley Brothers and William Radtke, which operated as a separate partnership and filed a separate return under the name of "Daley Brothers War Venture." This joint venture rented equipment from the partnership of Daley Brothers and the account in question was its repair account, charged by it to the jobs it performed. The result of making the adjustment to the joint venture's income where it belongs is to reduce the loss distributable by it to its members, of whom the partnership Daley Brothers is but one.

A hearing is requested. It is also requested that any communications relative to the subject matter of this protest be directed to Valentine Brookes, Esq., 1720 Mills Tower, San Francisco 4, California, one of the partnership's counsel.

Respectfully submitted,

DALEY BROTHERS,
A Partnership;

By /s/ JOHN P. DALEY.

State of California,
City and County of California—ss.

On this 15th day of November, 1944, there appeared before me, a Notary Public in and for the aforesaid City and County and State, John P. Daley, known to me to be the person who signed

(Testimony of John P. Daley.)

the foregoing protest for and on behalf of the tax-payer, Daley Brothers, a partnership, and the said John P. Daley deposed that he had read the said protest and that the statements of fact contained therein are true of his own knowledge, except for matters stated to be on information and belief, and that he believes these to be true;

[Seal] /s/ LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: Aug. 19, 1947.

Received in evidence September 28, 1955.

Q. (By Mr. Gillard): Now, sir, the stipulation of facts, Exhibit 16, is a letter dated January 26, 1943, submitted by you to the Department of Engineers in connection with the renegotiation of your 1942 business. It is a three-page document executed on January 26, 1943, and on page 3 thereof, item 14, is the question: "Basis used in reporting revenue from construction for income tax purposes," and they have places to check, "Completed contract," "Cash receipt," or "Accrual" basis, and there is checked "Accrual" basis. Was that document filled out before your income tax returns [78] herein, Exhibits 2, 3, 4 and 5 were prepared and filed?

A. I am quite sure that it was. It was dated January 26——

(Testimony of John P. Daley.)

Q. Yes. A. ——1943.

Q. And that would show, then, the basis on which you intended to file these returns, is that correct?

A. No, I think that's oversimplifying it. There's a very complex story in connection with that. Whether it is interesting here or not, there are facts that would show why this was done having to do with renegotiation. That was done because we——

Q. Just in answer to my question, does that show the basis upon which you intended to file your returns? A. No, not necessarily.

Q. That was the basis upon which the returns were filed?

A. I actually didn't know—that was an attempt to make this report agree with the renegotiation demands because we objected strenuously to renegotiating a contract which was not completed and we were ordered to do it, and it was my attempt to have this record or this letter agree with what they had forced us to do over our objections. The renegotiation officer demanded that we close the books when the job wasn't done.

Q. The simple question is whether or not in reporting your income from that job for income tax purposes on the completed [79] contract, cash or accrual basis. Now, I believe you said that that was prepared prior to the time the returns were filed, so my question was, Is that what you intended to

(Testimony of John P. Daley.)

do when you prepared your returns for the year 1942?

A. No, not necessarily. All that was for was to try to make this letter which we had to sign agree with the tax, that we knew we were forced to renegotiate the contract before it was completed and that we therefore couldn't report it was on a completed contract basis. The colonel who was negotiating us demanded we renegotiate that contract knowing it wasn't done so he could get off and go to war.

Q. In other words, you knew the fact that your books were on an accrual basis?

A. No, I didn't. I don't know right now what accrual basis means. I know it was not a contract basis because we were forced to change by the renegotiating officer.

Q. You were forced to change your books?

A. We were forced to change our basis of renegotiation. In other words, he demanded we close our books on the Delta contract and renegotiate it because he was in a hurry to get away to war, and this may have been stupid, but it was my idea that we couldn't, having negotiated the contract on some other—something other than——

The Court: Mr. Daley, what you say doesn't make very much sense to me. You could still conduct your renegotiation [80] on that basis and still file your income tax returns on a basis that reflected the facts. I don't believe there is any particular relationship. You may have felt you were

(Testimony of John P. Daley.)

being forced to comply with some demand on the part of the Army with respect to the renegotiation of the contract, but there was no requirement you had to file an income tax return on that basis. The Army didn't have any control over your income tax return.

The Witness: About the only answer I can give, sir, is that it looked like a good idea at the time, that I had perhaps any erroneous idea that your books should match, that all of your reports you made should be the same, that if you renegotiated—actually there was a tie-in. We had to give, we had to turn over our tax returns to the renegotiation officer and we assumed that they did tie in and had to tie in and we were forced to change for renegotiation, and it was erroneous, unquestionably, but I assumed we had to be consistent and that we had been forced to change from a completed contract basis to some other basis and it wasn't—I didn't know what else it was. It certainly was not a completed contract basis for the renegotiation.

Q. Mr. Daley, what is your understanding of the completed contract basis of accounting?

A. My idea is that you do not report income until you have had the work completed and accepted so that you know [81] what your costs are.

Q. What is your understanding of the completed contract method of accounting?

A. That is reporting the facts just as I stated, that you do not report your profits until you have the work completed and accepted so that you will

(Testimony of John P. Daley.)

know whether you have spent your money or not.

Q. Would there be any accrual system involved in the completed contract method of accounting?

A. I understand there could be, but I frankly am not an accountant and I am weak on that score and I don't know the answer.

Q. In the completed contract method of accounting, don't you enter in your books on a cash basis all expenditures and all receipts, and then at the conclusion of the contract, strike off your net profit?

Mr. McKee: Your Honor, Mr. Gillard is questioning Mr. Daley on a subject which he stated he knows nothing about. I object to the question on that ground.

Mr. Gillard: All right.

Q. When did you——

The Court: Well, Mr. Gillard, I don't know what you have in mind, but I don't think you need to pursue the——.

Mr. Gillard: Withdraw the question.

The Court: ——inquiry with this witness. He has been [82] told by the lawyers and by the accountants that this was a completed contract basis, and that is what he is going to say. I don't blame him for that.

Q. (By Mr. Gillard) When did you first hear of the completed contract method of accounting, Mr. Daley? A. 1921.

Q. And since at least 1935 you kept your books on the completed basis, completed contract basis of

(Testimony of John P. Daley.)

accounting? A. Since 1921 we did.

Q. Since 1921 you did that. Then you have followed that practice consistently since that time?

A. Yes.

Q. And you intended to do so in each succeeding year? A. Yes.

Q. And you intended to do so when you formed the limited partnership? A. Yes.

Q. You were familiar with the completed contract method of accounting and had that in mind when you entered into the new limited partnership, did you not? A. Yes, sir.

Mr. Gillard: Do you have a copy of the declaration—of the reorganization agreement?

Mr. McKee: I don't know.

Mr. Gillard: Of the limited partnership, the association—the articles of limited partnership of Daley Brothers— [83]

Mr. McKee: No, I don't.

Mr. Gillard: —and Bosse? Do you have a copy of it with you?

Mr. McKee: No, I don't.

Mr. Gillard: I show you a copy of it, Mr. McKee, in this same article I just got here. (Colloquy between counsel, inaudible to the reporter.)

Mr. Gillard: I am referring to paragraph 12.

Mr. McKee: Satisfactory.

Q. (By Mr. Gillard): Along with this letter of November 15, 1944, which I showed you a minute ago and marked for identification, there were included two exhibits: Exhibit B of which is the

(Testimony of John P. Daley.)

articles of limited partnership, Daley Brothers, and I will ask you if you recognize this as a copy of the limited partnership agreement and particularly whether or not paragraph 12 is your recollection of a copy of that agreement?

A. I don't remember a great deal about this. We had——

The Court: Can you stipulate that these documents were attached to this letter; save time?

Mr. McKee: I will stipulate to that, your Honor.

The Court: I assume that is correct.

Mr. McKee: I believe so.

The Court: We can waste a lot of time on formal matters.

Mr. Gillard: We offer in evidence Paragraph 12 of the limited partnership agreement of Daley Brothers, consisting of [84] Morris and John Daley and H. Bosse, Paragraph 12 entitled "Books," reading as follows:

"Shall be kept at all times during the continuance of the partnership, accurate, just and true books of account, where the general partners shall enter and set down a complete record of all money and other property borrowed, received, paid out, laid out and extended in and about the said business, and all the goods, equipment, commodities and merchandise bought, sold or obtained in the course of business or on account of said business and the management thereof, which said books shall be kept by the general partners at the principal place

(Testimony of John P. Daley.)

of business of the partnership in San Francisco, California. The general partners shall have the right to choose a fiscal year for the partnership or may keep the books upon a calendar year basis. Each partner, whether limited or general, shall have the right at all reasonable times to inspect the books and records of the partnership, and the right on demand to receive full and true information regarding any or all matters affecting the partnership with the right to have a periodic statement covering the current operations of the partnership, and the right to have a copy of the annual audit which shall be [85] made by some competent Certified Public Accountant. The general partners shall determine whether to keep the books on a cash or accrual basis.".

Offer that paragraph into evidence.

The Clerk: Defendant's Exhibit C introduced and filed into evidence.

Mr. McKee: No objection.

(Whereupon, Paragraph 12 of the document referred to above was Marked Defendant's Exhibit C in evidence.)

Mr. Gillard: May I subsequently make a copy of that page and replace it? I have not done so yet.

The Court: All right.

Q. (By Mr. Gillard): Now, sir, the Delta contract we are talking about was dated on July 8, 1942, was it not? A. Yes, sir.

(Testimony of John P. Daley.)

Q. And the refund claim that you filed in March of 1947, stated that the contract was completed on September 15, 1943, is that correct?

A. I don't remember what that said; if it said that, that is what was put in there. I really don't know. The negotiations were——

Q. I show you a certified photostatic copy which purports to be your claim for refund filed in March of 1947, and ask you if that is a photostatic copy of that document and your signature?

A. It is. [86]

Q. Now, sir, at the time you filed that refund claim, were you advised that the Treasury regulations permitted the keeping of accounts and the filing of returns on a completed contract basis only in the event that the contract was extended over a period of one year, past one year?

A. No, I wasn't told that.

Q. You were not told that? How did you happen to put down the date of September 15 as the date of completion of the contract in that claim?

A. The negotiations—perhaps I was mistaken, but the negotiations for the settlement of the accounts, the amount of money due us, ran on until late in the year. We spent at least six months in trying to determine whether we were liable for a couple million feet of lumber and whether—I have always considered that the settlement of the amount to be received was the completion date rather than the physical completion of a contract. In other words, in my past experience, we have never counted

(Testimony of John P. Daley.)

profit until we had an unquestioned agreement as to how much money was coming in, and that was not settled until September.

Q. That was with reference to renegotiation?

A. No, no. That is in reference to the settlement of the amount of money due on that contract. In February we had a great jumble of accounting to be straightened out.

Q. I see. [87]

A. The lumber—if you want to hear it—the lumber was an example. We had lumber charged to us which had gone to other jobs, lumber from other jobs sent to us, and I spent at least six months trying to find out where two million feet of lumber had gone and to find out whether—their opening was we had to pay for that lumber and we had to prove to them that we had not wasted it, and we didn't know until we had that negotiation for the final payments, whether we would collect the money or not.

Q. Did you have any talks with the Department of Engineers which indicated to you that the contract was completed on September 15, 1944?

A. No, we had talks—we did not know how much money we were going to receive until then. The actual complete, physical completion of the contract was in February.

Q. And you knew——

A. (Continuing): ——and the acceptance of the work, but not the acceptance of our billing nor

(Testimony of John P. Daley.)

the responsibility for us to pay for materials which had been ordered through the Engineers.

Q. Prior to September 15, 1943, you knew the engineers had accepted this contract as completed on February 15-16th?

A. Oh, yes. But we did not know how much money we were going to collect from them.

Q. You knew that in April of 1943, did you not? [88] A. No, it was September.

Q. Let me finish my question. You knew in April of 1943 that the Engineers had accepted the contract as completed as of February 16?

A. Oh, yes.

Q. 1943? A. Yes.

Q. Is that correct? A. Yes.

Q. And they sent you a letter to that effect and you acknowledged receipt of it?

A. Yes. I wouldn't take too seriously any dates on any letters from the Engineers, because most of the letters were post dated or made to—the dates were put on there to suit whatever looked right. Kind of hard on them, but it wasn't necessarily the correct date the physical work was accepted.

Q. I show you a carbon dulplicate original letter dated April 27, 1943, and ask you, sir, if that is your signature on there?

A. Yes, that's my signature.

Mr. Gillard: I will offer this in evidence as Defendant's next in order.

The Clerk: Defendant's Exhibit D introduced and filed into evidence.

(Testimony of John P. Daley.)

(Whereupon the letter referred to above was marked Defendant's Exhibit D in [89] evidence.)

Mr. Gillard: This is a letter, carbon copy of a letter from the Engineers to Daley Brothers, reconstruction of Abraham Relocation Center, Contract Number W 2195 eng-247, dated April 27, 1943.

DEFENDANT'S EXHIBIT D

"Gentlemen:

"You are hereby notified that the work under Contract No. W 2195 eng-247, Job No. T-1, dated July 8, 1942, with any amendments or modifications thereto for the construction and completion of Abraham Relocation Center at Delta, Utah, is hereby accepted as completed as of February 16, 1943.

"It is requested that you promptly acknowledge receipt of this notice of acceptance on the original and one copy and return them to this office. The other copy is to be retained in your files.

"Yours very truly, signed Merwin H. Smith, Major, Corps of Engineers, Contracting Officer.

"Receipt is acknowledged of the above notice of acceptance and its terms are understood.

"Daley Brothers, signed John P. Daley."

(Testimony of John P. Daley.)

And then on the back it shows a machine stamped received date of May 6, 11:01 a.m. '43, Office Division Engineer, Pacific Division, Salt Lake City, Utah.

That is all the questions I have. [90]

Redirect Examination

By Mr. McKee:

Q. Mr. Daley, you testified that it was your understanding that the figure in Plaintiff's Exhibit 1 of $65,597.77 was the amount shown on the books as being undistributed profits to Mr. Radtke as of December 31, 1942, did you not?

A. Yes, I did.

Q. Did Radtke make current withdrawals in 1942 for living expenses?

A. Yes, we all had drawing accounts. We had wages which are charged to the cost of projects.

Q. Did he do that all during 1942?

A. I don't remember.

Mr. Gillard: I object to that question. I think the books is the best evidence of that particular phase of the matter.

The Witness: I don't remember.

The Court: Perhaps so, if you are interested in establishing accurate dates.

Mr. McKee: No, I am not, your Honor, just want to show that——

Q. Did that, to your knowledge, occur before July of 1942, as well as after July of 1942?

(Testimony of John P. Daley.)

A. As far as I remember, yes.

Q. Do you know whether the amount shown on the return filed by Daley Brothers' Delta Venture, whether Mr. Radtke's distributive share of the profits would include both amounts [91] which he had withdrawn, as well as amounts which he would have left in the business?

A. I don't know. I would guess that his salary—I don't know whether there is any distinction between salary and drawings. I don't think he drew anything other than his regular salary account, and I don't know—I would presume that that is after the drawing of salaries, that reported profit.

Q. Mr. Daley, was the 1942 limited partnership return of Daley Brothers, which is in evidence, accepted by the Commissioner of Internal Revenue as filed? A. No, it was not.

Q. Was the 1943 limited partnership return of Daley Brothers accepted by the Commissioner of Internal Revenue as filed?

A. No, it was not.

Q. Do you remember what the adjustments were that were proposed?

A. Yes, they objected to our trust funds for the children, and I have forgotten the dates, but there was a good deal of negotiation and discussion on it and the matter was compromised by our paying Morris and I paying, substantially all of the taxes for the trustee account, 95 per cent or something like that. There was a small compromise figure but we paid substantially all of it as our income.

(Testimony of John P. Daley.)

The Court: You included it in your own?

The Witness: Yes, we paid taxes on that in addition to [92] our own income.

Q. (By Mr. McKee): Mr. Daley, who was the individual who negotiated the various government contracts which were entered into in 1942 and 1943?

A. I believe I negotiated all of them.

Q. In what name were those contracts taken?

A. Daley Brothers. All of them were the same.

Q. What letterhead was used in connection with the conduct of the business arising under those contracts?

A. I think the same letterhead that was shown on one of these Exhibits, Daley Brothers.

Q. I show you Plaintiff's Exhibit 1 and ask you whether that is a letterhead that was used in the conduct of the business in 1942 and 1943?

A. Yes, it was never changed.

Q. Was that letterhead used in 1941 also?

A. Yes.

Q. Where were the offices of Daley Brothers in 1941? A. 426 Bryant Street, San Francisco.

Q. Were those offices changed when William Radtke became associated in 1942? A. No.

Q. Or at any time subsequent in 1942 and 1943?

A. I think not.

Q. Were printed checks used in making payment to employees [93] and some contractors under the various contracts entered into in 1942 and 1943?

A. Yes.

(Testimony of John P. Daley.)

Q. What name appeared on those printed checks?

A. Daley Brothers, by Morris Daley or John P. Daley.

Q. Did Mr. Radtke have authority to sign checks on the business?

A. No, he did not. He may have had some payroll account authority, I have forgotten that, but I think not in the general fund.

Mr. Gillard: Just a moment. I am going to move to strike all these series of questions and answers just propounded by counsel as being inconsistent with his stipulation of facts here, Exhibit 16, submitted on January 26th, 1943, by Mr. Daley, which specifies that William Radtke was a silent partner engaged in this contract.

Mr. McKee: I don't see that is inconsistent with any of these questions I have asked.

Mr. Gillard: The purpose of these questions is to indicate that this was a Daley Brothers Contract in which Radtke had no interest.

Mr. McKee: I am sorry, it isn't. The purpose of these questions is to indicate that there was no change in the way the business represented themselves to the public between 1941 and 1943. [94]

The Court: Well, of course the question counsel raises is whether that is material. Tax liability has got no particular relationship to how the business was represented to the public.

Mr. McKee: I believe that is a legal question and we intend to brief that point.

(Testimony of John P. Daley.)

The Court: I think it wouldn't, unless there was some fraud involved; otherwise, whoever makes the money has to make the return on it.

Mr. McKee: That is true, your Honor, but——

The Court: I don't see any great problem.

Mr. McKee: That is certainly true. The point that I make is that you cannot change your tax returns or the manner in which you report income simply by making a formal change in your partnership by filing a certificate of limited partnership, for example, or by executing any other agreements.

The Court: Well, of course, you can always go behind the particular entity and find out what the true entity is. I don't know whether the rule is obverse or converse. It may become self-serving. I mean, I don't think there is any law to sustain the doctrine that—I could have two companies and operate them and then make a claim that they are not separate companies because all the business was conducted out of the same office under the same name. [95]

What I am trying to say is I have never heard of that doctrine of going behind the entity being conversely, as you are indicating.

Mr. McKee: I believe it is a matter which we will satisfy your Honor on in the briefs.

The Court: All right.

Mr. McKee: I have no further questions.

The Court: Anything else, Mr. Gillard?

Since it is clear what the question is and the reason for the asking of this last series of ques-

(Testimony of John P. Daley.)

tions, the objection really goes to the weight of the evidence than to its admissibility. I will overrule the objection and deny the motion to strike.

Recross-Examination

By Mr. Gillard:

Q. The Commissioner of Internal Revenue accepted the return for 1942 allocating or reporting the income from the Delta venture contract for that year?

A. I don't think so. I think that was the year he objected to it.

Q. To the allocation of the trusts?

A. I am confused. Perhaps he accepted the Delta venture report, but the portion of which went from the Delta venture to the limited partnership was rejected.

Q. Only as to the distribution of income to the trustee, is that correct? [96]

A. I think that is correct.

Q. But as far as filing the return for the year 1942 is concerned, it was accepted, was it not, as a return of income for 1942?

A. I think it was.

Q. You referred to some difficulties on lumber and negotiations on up until September on that matter. Was that subject to a change order in the contract, was any adjustment made in the contract price on account of that?

A. It was threatened to make an adjustment of

(Testimony of John P. Daley.)

the contract price in that we had been billed or—may I start over again?

It was threatened to affect our net profit on the job because we were billed for thirteen million feet of lumber when only eleven million feet of lumber had been used on the job, and it was up to us to fight it out to find out where that lumber had gone, to see whether we would have to pay for that out of the—as a cost to the job. That was the reason why we didn't know until September. I personally didn't consider that the job was done from the point of view of a completed contract, as I had known it, until we knew whether we were going to have to pay for the two million feet of lumber or not.

Q. Mr. Daley, wasn't this subject of excess lumber purchased by Daley Brothers subject to negotiation and subject of a [97] change order in the contract?

A. I have forgotten, but I think not. I think as it started out, it was simply we had received billings for the lumber and we wanted to see whether we couldn't get relief from paying for that lumber, get someone else to pay for it. There may have been a change order.

Q. Change order Number 9, dated December 4, 1942, listed on the Statement of Facts, increased the amount of the contract price to you for excess lumber purchased by you in the amount of $83,344.66, and that change was accepted by you on the 4th of September, 1942.

(Testimony of John P. Daley.)

Mr. McKee: Fourth of December, 1942?

Mr. Gillard: Do you recall that, sir?

A. I recall that most of the papers that were prepared later in 1943 were dated in 1942, and I would——

Q. (By Mr. Gillard): Mr. Daley, before you say that, I would like to have you look at that document and see where the words and figures, "4th day of December, 1942," has been typed in above your signature, ask you if that is the date on which you signed that document?

A. I don't know.

Q. Would you say you did not sign that on that date?

A. I don't know. I know that there were many documents prepared by——

Q. Let us talk about this one. Did you sign this document [98] on the date it shows?

Mr. McKee: Your Honor, I think the witness should be allowed to answer. He was trying to give the basis for this statement that he doesn't know.

Q. (By Mr. Gillard): Did you sign that document on some other date than is inserted above your signature? A. I don't know.

Q. Was there any other change in this contract which involved lumber?

A. I think there were lots of changes.

Q. Were there any changes involving lumber, Mr. Daley?

A. May I read this to see what this is all about?

Q. I asked you if there were any other changes

(Testimony of John P. Daley.)

besides lumber in the change orders in this contract?

A. Any other change orders involving lumber other than this one?

Q. Yes.

A. Yes, practically all of them did, but this was the one unquestionably set up to adjust the thing.

Q. This is the one that was set up specifically to adjust the lumber dispute you have been talking about, is that correct?

A. That's right. It was not settled in December, 1942; it was not settled until September of the next year.

Q. Do you deny the signature on that document of December 4, 1942? [99]

A. I believe that I probably have signed 25 or 30 of that type of a document because the Army Engineers were very convincing that they wanted to get these records in before closing the contract. It may have been illegal, but they told us to do it.

Q. Is it your testimony now, Mr. Daley—I will put Exhibit D in front of you again, which is your acknowledgment in May of 1943, that the contract was completed and accepted at that time. Is it your testimony now that there was a change order in September of 1943 involving a change in this contract of $83,000 subsequent to the time you signed the statement that the contract was completed?

A. The contract unquestionably, the contract was completed on February 16th, yes, I signed that, it was completed, but the negotiations for the settlement were not completed until September.

(Testimony of John P. Daley.)

Q. You have your vouchers with you, sir, payments on this job? A. I don't have anything.

Mr. McKee: Your Honor, there is a stipulation that voucher payments were made.

Mr. Gillard: This is additional information going to the credibility of this witness.

I will show counsel a tabulation of the payments made in connection with the voucher payments, dated April 29, 1943, [100] payment in the amount of $270,341, and the accompanying schedule showing change order Number 9 in the amount of $83,344.50 to be included in complete, 100 per cent net payment.

Q. I show you, Mr. Daley, a tabulation dated March 6, 1943, which discloses the percentage of completion of the contract as of that date and the amount of payments made on the contract to date and the amount due on the vouchers of these computations, which voucher was given to you on April 29, 1943, and ask you if you ever saw that document before? A. I think so, yes.

Q. Made as of March 6, 1943?

A. That is the date shown on it.

Q. That is correct, showing change order Number 9, which is the change order for lumber we have been talking about?

A. I would hate to guarantee that any of those dates shown on the Army documents were accurate, because they were prepared when the Army got around to it and got the facts, and there was no more relationship between the dates that were

(Testimony of John P. Daley.)

shown on the documents and the time that they were signed than there was in the renegotiation papers where we volunteered to give back money that was not a voluntary contribution.

Q. The voucher accompanying that tabulation was dated April 29, 1943, Mr. Daley. Would you say that that was an incorrect date, also?

A. Probably not. This was March—— [101]

Mr. Gillard: I don't want to unnecessarily encumber the record or cause the Court to read unnecessary documents; if the Court is satisfied there is enough in the record to identify the documents I have talked about, I will leave it as it is; otherwise, I will offer them in evidence.

Mr. McKee: I don't see the materiality of these specific dates you are discussing and questioning Mr. Daley about. You're asking him about matters that occurred 13, 14 years ago, and as to whether they occurred in March or some later month in the year.

The Court: Well, the only point of the inquiry was the witness stated that the reason why he put in the notice, the letter that was referred to——

Mr. Gillard: Claim for refund.

The Court: ——Defendant's Exhibit B, that the reason the contract was not completed until September was because of the fact that it was not until that date he had completely settled a number of matters, including this difficulty over a large amount of lumber.

(Testimony of John P. Daley.)

Counsel is now attempting to demonstrate the fact that the matter had been concluded and paid for in a voucher back in April of the same year.

Mr. McKee: Your Honor, I believe that he stated that as one example of matters that were not settled until after February 16, and that was demonstrated to be one of those things. [102] He stated that there were a number of matters in dispute, a lot of accounts that were not settled until later in that year.

The Witness: It has been a long time. I would like to refresh, if there is any way, I would like to refresh my memory on this lumber matter, because I know that they tried to collect more from us after that.

The Court: For your purposes, Mr. Gillard, can't you read into the record the particular items you have reference to?

Mr. Gillard: If your Honor please, the documents referred to are: Change Order Number 9, dated December 4, 1942. It is in the form of a letter addressed to Daley Brothers, 426 Bryant Street, San Francisco, and the pertinent portion is: For payment of allocated lumber purchased in excess of the amount provided for in the contract, as follows: Total amount of lumber purchased by Daley Brothers, $555,392; amount set up in contract for purchase of allocated lumber, $472,048. Total increase in contract amount, $83,344.66. And in acknowledgment on the bottom: "The foregoing modification of said contract is hereby accepted this

(Testimony of John P. Daley.)

4th day of December, 1942. Daley Brothers, John P. Daley, Partner."

And schedule of payments under Contract W-2195 eng-247, dated March 6, 1943, showing as the last item on there, Change Order Number 9, $83,344.66, completed 100 per cent as [103] of March 16, 1943, value $83,344.66, and the total partial payment included in this voucher, $83,344.66, the voucher being made on February 29, 1943, in the total sum of $270,341.28.

The Witness: I would like—I don't know what my rights are here, but I would like to go into a little more detail as to the complications on this lumber; because the picture as it is being presented here is not true. And if it is permissible, I would like to give some of the details of this so-called lumber mess, because I haven't perjured myself, and I know that I did work until September in straightening out, attempt to collect money from us for lumber, and I can explain it in great detail if there is time to do it.

The Court: Well, there must be some record of that.

The Witness: Unfortunately, sir, the argument is because there were no records.

The Court: The matter only comes up because in your claim for refund, you made this statement about the contract not being completed until September.

The Witness: That's true.

The Court: And the attorney for the Govern-

(Testimony of John P. Daley.)

ment is attempting to examine you to see whether that was so or not. For our purposes, I think it is sufficient that it appears that the contract was completed in February, not in September.

The Witness: I would like the chance——

The Court: So far as the contract is [104] concerned.

The Witness: The determination, sir, of our profit on the job was not possible at that time and I know, I can explain in great detail what happened during the months of the middle of the year.

The Court: That may be true. I don't think there is any issue as to that.

Mr. Gillard: I will offer in evidence at this time, if the Court please, a certified copy of the claim for refund filed by John P. Daley, on March 15, 1947.

Mr. McKee: Isn't that already in the record?

Mr. Gillard: I have just checked with the Clerk. It isn't there.

The Court: I was looking for it and I couldn't find the claim for refund. There are a lot of exhibits in the stipulation, maybe it is in there.

Mr. Gillard: I beg your pardon, I know why I missed it. It is attached to the stipulation of facts as Exhibit 21.

The Court: That may be.

Mr. McKee: I think that is true.

The Court: This is the claim for refund of John P. Daley.

Mr. Gillard: Yes. 1947.

(Testimony of John P. Daley.)

The Court: 14 March, 1947.

Mr. Gillard: That is the one I was referring to. I will withdraw my offer. [105]

The Court: Very well.

Mr. Gillard: No further questions.

The Court: Is that all, now?

Mr. McKee: Yes, sir.

The Court: That is all, Mr. Daley.

You have another witness?

Mr. McKee: Yes, I do, your Honor.

The Court: We will take a 10-minute recess, then.

(Short recess.)

Mr. McKee: I would like to call John Daley back to the stand, your Honor, for just one or two questions concerning this lumber situation.

The Court: All right.

JOHN P. DALEY

resumed the stand for further

Redirect Examination

By Mr. McKee:

Q. Mr. Daley, did the acceptance by the United States and the consent to make the change order, which is dated December 4, 1952, settle all outstanding differences that you had with the United States concerning the lumber?

A. No, it did not. Part of the arguments, however, was not with the United States Government;

(Testimony of John P. Daley.)

some of them were with the lumber vendors who charged us with the lumber, in addition to that considered in the settlement, in the December 4 settlement. [106]

Q. Did you spend considerable time subsequent to April of 1952 travelling to other contractors to determine how much lumber they had that had been originally ordered for you and how much lumber that had been originally ordered for them and had been diverted to you?

A. Yes, I visited ten or fifteen other contractors with this sheaf of bills which we had received for lumber which were not covered in the Army settlement, and in some cases found that they had received the lumber, but when we got done we still had a number of, a great number of cars of lumber unaccounted for. We then had a session with the Engineers and convinced them that the only answer that anyone could imagine was that the Japanese had used the lumber in furnishing their barracks.

Q. Was there any change order entered into to solve that dispute?

A. No, it was not necessary to have a change order, because the bills were taken over by the Engineers and allocated to the people who should have paid them.

Mr. McKee: That's all I have.

Mr. Gillard: No further questions.

(Witness excused.)

Mr. McKee: I would like to call Mr. Rosenblatt.

SAMSON ROSENBLATT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [107]

The Clerk: Please state your name to the Court, sir.

The Witness: Samson Rosenblatt.

Direct Examination

By Mr. McKee:

Q. What is your profession, Mr. Rosenblatt?

A. Certified Public Accountant.

Q. Where is your office?

A. 369 Pine Street, San Francisco.

Q. How long have you been engaged in that profession?

A. I was—received my Public Accountant's Certificate in 1933. Prior to that I acted as a Public Accountant from 1928.

Q. What has been the nature of your practical experience in your profession?

A. General accounting and auditing procedures.

Q. When did you obtain your Certificate as a Certified Public Accountant? A. 1933.

Q. What degrees do you hold, if any?

A. Bachelor of Science——

Mr. Gillard: Stipulate to his qualifications.

Mr. McKee: Thank you.

Q. Will you tell the Court, Mr. Rosenblatt, what the completed contract method of accounting is?

A. The completed contract method of accounting

(Testimony of Samson Rosenblatt.)

is a method of reporting profits on a job after the work has been completed, [108] and not before.

Q. Is that method of accounting used in the building, installation and construction business?

A. Very generally.

Q. Is it necessarily inconsistent to say that books of account shall be kept on a cash or accrual basis and also to say the completed contract method is used to keep the books? A. No, not at all.

Q. Will you explain why that is not inconsistent?

A. Well, the cash method records the receipts and expenditures as they are made. The accrual method reports the billings, whether they have been paid for or not, for work done, and it records the billings for merchandise or materials of any kind which have been purchased prior to their payment.

Q. In connection with keeping books on a completed method and determining profits for income tax purposes on that basis, is it necessary that the books of account be kept either on the cash or accrual basis? A. Yes.

Q. In your opinion, Mr. Rosenblatt, would you say it is good accounting practice in the building, installation and construction business, to use the completed contract method of determining net income? A. Yes, it is very good.

Q. And why is that good accounting [109] practice?

A. Because you can more accurately determine

(Testimony of Samson Rosenblatt.)

the profits from each individual job upon its completion.

Q. Is there any particular reason why, in the construction, installation and building business, that that is more important than in other businesses?

A. Well, yes; because the payments, receipts of payments, the setting up of bills doesn't necessarily coincide with the expenditures of your accrual of your expenditures. For example, a contractor may be paid every month on the 20th of the month for bills which were accrued in the previous month, and he may be accruing bills for the succeeding month and have them on the books, and not even be able to, according to the terms of the contract, set up, in his accounts receivable a bill which was done in the succeeding month. There is always a lag.

Q. In your opinion, Mr. Rosenblatt, would you say it is good accounting practice to use the completed contract method of determining income whether or not the time elapsing between the execution of the contract and the completion of the contract is in excess of 12 months?

A. I think it is very good accounting.

Q. Does that apply for a contract which takes only six months from the date of execution to the date of completion? A. That's right.

Q. In the accounting profession, what time of the year is it general practice to close out contracts on the completed [110] contract method?

A. Well, usually the contractors close out the completed jobs at the end of their fiscal year; the

(Testimony of Samson Rosenblatt.)

jobs which have been completed during the year are closed out at the end of the fiscal year, the profits.

Q. And is there any reason why those contracts are not closed out on the date of completion?

A. Well, no particular reason.

Q. But it is general practice to close them out on the last day of the fiscal year?

A. (Witness nodding.)

Q. Have you recently had occasion to examine the books of account, which are Plaintiff's Exhibits Numbers 7, 8, 9 and 10 for identification?

A. Yes.

Q. Which I am pointing to now? Are entries on those books of account made on the accrual basis?

A. I think so; yes. Yes.

Q. On the occasion you examined the books of account referred to, did you examine the entries which were made in those books of account in connection with determining the profit or loss from a contract designated in the books as the Abraham Relocation Center contract? A. Yes.

Q. As of what date were those entries [111] made? A. December 31, 1942.

Q. Can you tell the Court what principal entries were made in closing out the Abraham Relocation Center contract profit or loss?

A. The principal entry was an entry from job cost to profit and loss, there was an entry of overhead to profit and loss, was an entry of truck opera-

(Testimony of Samson Rosenblatt.)

tions, some discounts, small ones, and estimated profits charged in profit and loss.

Q. In your opinion as a Certified Public Accountant, Mr. Rosenblatt, based on your examination of these books and the entries which you have referred to, what accounting method was used in determining profit or loss from that contract?

A. Completed contract method.

Q. Did you also examine the entries which were made in connection with the determination of profit and loss from other contracts which were shown on the books of account for 1942? A. Yes.

Q. What method of accounting was used in determining the profit or loss from those contracts?

A. Completed contract.

Q. What are the principal facts leading you to that conclusion?

A. Well, I examined the records in the—job cost record account of November and December of 1941, and in there I saw [112] entries to job costs, and in 1942 those job costs were closed out into profit and loss.

Q. Were job costs closed out in December of 1941? A. No; they were not closed out then.

Q. Mr. Daley, were Daley Brothers clients of yours in 1941 and in 1942 and 1943?

A. Yes.

Q. When did you first represent Daley Brothers?

A. Well, I think it may have been in 1930, thereabouts.

(Testimony of Samson Rosenblatt.)

Q. When did you cease representing them?

A. 1945.

Q. What were the services which you performed for the Daley Brothers during 1941, 1942 and 1943?

A. Well, I checked their records and supervised their records, supervised a great many of the entries made in them, and closed their books, made out their tax returns.

The Court: What was that last question and answer?

(Record read by the reporter.)

Q. (By Mr. McKee): During 1942 did you supervise the establishment of the accounts which were found in these books of account? A. Yes.

Q. Were any new accounts established in these books at your direction or under your direction at the time Mr. William Radtke became associated with John and Morris Daley in 1942?

A. Well, there was a Radtke withdrawal account at the end of [113] 1942. I think it was just a withdrawal account.

Q. Were any accounts established at your direction or under your supervision in 1942 for any separate entity known as Daley Brothers Barracks venture, or Delta venture? A. No.

Q. Were the job accounts for the various barracks contracts and for the Salinas and Abraham Relocation Center contracts kept in the Daley Brothers' books? A. Yes.

Q. Did you supervise and direct the entries in

(Testimony of Samson Rosenblatt.)

the books of account as of December 31, 1942, closing out profit and loss of the Abraham Relocation Center account? A. Yes.

Q. Why did you make those entries?

A. Because I was under the impression that the contract had been completed. I closed it out on the basis of the information I had at hand at that time.

Mr. McKee: I have no further questions.

Cross-Examination

By Mr. Gillard:

Q. Mr. Rosenblatt, I didn't quite understand your explanation of the difference between the accrual basis and the completed contract basis of accounting.

A. Well, the entries to a ledger on an accrual basis are the entries of events as they occur, the entries as to the billing of the accounts for work done, the entries into the [114] books for merchandise or services received as they occur, rather than when they are paid.

Q. You are talking now about what, sir, the accrual method?

A. The accrual method of accounting.

Q. Entries are made when payments are made?

A. No. Entries are made when the events occur irrespective of when payment is made or when it is received.

Q. All right. Now, what is the difference between that and the completed contract basis?

A. The completed contract basis is a method

(Testimony of Samson Rosenblatt.)

used with an accrual basis or with a cash basis, in determining the profit from the contract.

Q. In other words, in your opinion then, in looking at a set of books, if it were determined to be on an accrual basis—withdraw that question.

You indicated that these books were kept on an accrual basis; is that correct? A. That's right.

Q. What, in addition to what you have described, indicate that it was on a completed contract basis?

A. Well, I just explained, I think. The fact that entries were made to job costs in 1941 for jobs which were still carried forward as a job cost item into 1942, and the job wasn't closed out to profit and loss until 1942.

Q. You are talking about now events that occurred in 1941 [115] carried over to 1942?

A. That's right.

Q. With reference to the Delta Contract, that is the thing you referred to, those books, with reference to the Delta contract, were kept on the accrual basis; isn't that correct?

A. That's right; the books were.

Q. Now, with reference to the Delta contract, what entries are there which indicated to you that was a completed contract basis of accounting?

A. Well, in the first place, there is an entry made at the end of the year for bills not yet received, which, to the best of our ability at that time, as I recollect this, and this is fourteen years ago,

(Testimony of Samson Rosenblatt.)

but which would be sufficient and were sufficient to cover services and merchandise which had been received and for which an indebtedness had occurred. Those we charged to job costs, and at that time it was my impression that the job was complete and had been finished and that those entries would complete the cost of that job.

Q. In other words, you formed your opinion that these books were kept on the completed job basis because you had received some information the job was completed and therefore you were closing the books out as of the end of the year?

A. That's right.

Q. Now, what information did you receive that the job was completed at the end of 1942? [116]

A. Well, I don't remember. I can only say this: It is my recollection—it is my recollection that the equipment which was on the job had all been brought back to San Francisco, all the principals on the job, the supervisors, the heads of departments, all people who had any appreciable amount of authority on the job had come back to San Francisco and were here at that time. And if my memory serves me correctly, I think I was informed by somebody that the job was completed. I made some examination to determine that it was.

Q. And in accruing the total amount receivable under the contract you at some point made an entry in there, credit the job cost account of the total amount receivable under the contract; is that correct?

(Testimony of Samson Rosenblatt.)

A. I think that perhaps it was; my recollection, at any rate.

Q. And it is your recollection, you have examined these books recently, and the returns recently in Mr. McKee's office; have you not?

A. I looked at them.

Q. It is your recollection that the total amount of gross receipts reported on the income tax return for the Delta venture were recorded in the books as a credit to the job costs account in that same amount? A. I think so.

Q. Now, sir, do you know when you got—when you made those [117] entries in the books?

A. I couldn't tell you at this time, no; I don't know.

Q. Do you know, sir, as a matter of fact, that the entries made in that account as of December 31, 1942, included the additions to the contract by change orders made as late as February of 1943?

A. I heard that testimony here.

Q. Are you familiar with that as a fact, sir?

A. I heard it now here for the first time. I don't remember. May I say to you in some sort of an explanation that in many instances, in dealing with the government, that figures were arrived at and the contracts and change orders didn't come through for some time. Now, it is entirely possible—I don't say that this occurred—but it is entirely possible that we had those figures available and that they were entered at that time. I make this only as a conjecture.

(Testimony of Samson Rosenblatt.)

Q. In any event, Mr. Rosenblatt, there are no entries made in 1943 for receipts of income under this contract; is that correct?

A. Well, I wouldn't know. It is quite possible that there weren't.

Q. I turn to the cost—the job cost ledger, DB-16 in Plaintiff's Exhibit 9 for identification, and ask you if there are any entries in there for receipts under the Delta contract in 1943? [118]

A. Well, the receipts are not posted to the job cost. These show expenditures, and they show an allocation of costs.

Q. Receipts are not posted to job costs?

A. No, sir.

Q. As a credit item? A. No, sir.

Q. Perhaps you will tell me what the entry in there, the entry of August 31, credit ARC $2,435,508 is.

A. That's from the sales journal, Page 1.

Q. Right.

A. Let me see the sales journal. Maybe I can explain it; I don't know.

On August 1, 1942, there is a charge to accounts receivable of $2,834,212.51.

Q. That was the amount of the original contract; is that correct?

A. I think that is so. It says contract dated July 9, 1942, to be completed, or I imagine it is to be complete 9-6-42, War Department, Abraham Relocation Center, Delta, Utah, Contract W-2195, eng-247. And there is credited to overhead account

(Testimony of Samson Rosenblatt.)

$141,710. There is credited to job cost account $243,484—wait a minute—$2,434,847.51, and there is credited to estimated profit, $257,655.

Q. That is the opening entry when the contract was received?

A. That's right. [119]

Q. Showing the distribution of the original amount of the contract between job costs, estimated overhead and estimated profits; is that correct?

A. That is correct.

Q. That is typical of the accrual method of accounting; is it?

A. Well, it's one method that is used.

Q. That is permissible, that is an accrual method of accounting?

A. Yes.

Q. Now, so as not to be too tedious about it, since you have examined the books, is this a correct statement: That as of December 31, 1942, either in the sales journal or in the job cost or in the profit and loss account there is entered in these books, as of December 31, 1942, the total receipts under this contract?

A. I think that there was; I am under the impression that there was.

Q. That is true?

A. As far as I know it is.

Q. Can you examine the books, Mr. Rosenblatt? We don't want to have any mistake about it.

A. I didn't examine them thoroughly. I didn't make an audit at this time, I made a cursory examination to refresh my mind for some factors.

(Testimony of Samson Rosenblatt.)

As to that I am not positive; and [120] I wouldn't say so under oath.

Q. Well, I'll give you a chance to look; you take a look at it.

A. You want me to give my findings as I see them, or do you want me to summarize them?

Q. Either way you want to do it, Mr. Rosenblatt.

A. Well, I find an entry for change order Number 1 in the sales record that was made in October of 1942. I find one entry on December 31 for change orders in the journal, the general journal, on the change orders 2, 3, 4 and 5. December 31st.

Q. And the amount of that?

A. The amount of 2, 3, 4 and 5 is $450,479.77. You want Number 1?

Q. No; I have that. You also find on sales journal 1 an entry for change order Number 1 in the amount of $362,980?

A. I think I told you about change order 1. Yes; I told you that, October, 1942. That is in the sales journal, Page 1.

Q. Now, let's go down just a minute. On the sales journal you have an original entry there for the original contract of $2,834,212; is that correct?

A. That is correct—51 cents.

Q. I left off the cents, pardon me. You have another entry in there for Change Order Number 1 in the amount of $362,980? [121]

A. That's right.

(Testimony of Samson Rosenblatt.)

Q. And you have another entry in there for—labelled for change orders 2, 3, 4 and 5 of $450,779?

A. Wait until I get that figure again. Yes.

Q. And do you also have in there an item for roads of $8,000?

A. I have one here for tank towers, $8,000.

Q. Tank towers? Is that what it was? Tank towers, $8,000?

A. Right. I don't see where that $8,000 is you mentioned.

Q. Let me put it this way, sir: what do you find in these books, whether in the sales journal or in the journal or in the job costs account which indicates the receipts from this contract? I think we have mentioned three already.

A. Wait a minute, this $8,000 tank towers, there is a reversing entry here, $8,000.

The Court: Well, do you have to go into so much detail? I don't want to spend a long time finding out about this $8,000.

Mr. Gillard: All right.

The Witness: One here for $28,000 for roads.

Mr. Gillard: That was included; was it not? Included in the $450,000 figure, sir?

Let me put it this way to you: Mr. Rosenblatt, have you examined these books for determining that the entire receipts from this contract were recorded as of the end of [122] 1942?

A. I haven't made that examination, because if I had thought that the contract was completed at

(Testimony of Samson Rosenblatt.)

the end of 1942, I would not have made out the return in the manner in which I made it.

Q. Your purpose was to include in the books as of December 31, 1942, the gross receipts received or to be received under the contract?

A. That's correct.

Q. That's correct? And that was based upon this information you say you got from somewhere that the contract was completed as of that time; isn't that correct? A. That is correct.

Q. Now, to go back to that question again, who was it that told you that the contract was completed on December 31, 1942?

A. I give you the same answer I gave you before; I don't remember.

Q. Do you recall that you were told specifically that, sir? A. Well, it is my impression I was.

Q. Did you have a discussion, for example, with Mr. Daley indicating that for tax purposes, it would be better to close these books out and report this income for 1942? A. I don't believe so.

Q. Wasn't Daley Brothers engaged in a million dollar contract for 1943? [123]

A. I don't think so at that time.

Q. At that time they weren't engaged? What time is that?

A. The early part of 1943. I don't think they had another contract until later in the year, if I remember correctly. I don't know, I won't be positive, but I don't think that's so.

Q. They had other bids out at that time?

(Testimony of Samson Rosenblatt.)

A. Well, I presume they possibly may have.

Q. Did they discuss with you the advisability of returning this income for 1942?

A. I don't remember; it is too far back.

Q. When I say "they," I mean John or Morris Daley. A. I don't remember; I couldn't say.

Q. So that at least it is your impression that the reason you finished these books in that fashion at that time was because of some information you received from either John or Morris Daley that the contract was completed?

A. Not only from them—if it was received from them—not only from them; I made other inquiry.

The Court: What did you put down any place in the books to show that the contract was completed as of December 31, 1942?

The Witness: Well, let me see if I can. Here is a charge of a thousand dollars to WAR—WRA—War Relocation Administration, or something like that, I think, for borrowed blankets lost. Here is $2,000 for repairs of equipment. [124]

The Court: Those are merely details on an accrual basis of reported disbursements. What is there about the books that show that this is any different than any other books in which the records were kept upon an accrual basis?

The Witness: Well, there was charged to profit and loss the job costs——

The Court: Well, that could be in the case of a man that had several contracts, and he elected to carry his books along in that way on the accrual

(Testimony of Samson Rosenblatt.)

basis. Is this any different than any other books of account kept on an accrual basis?

The Witness: I think I may have the answer to that here.

The Court: You say that you thought the contract was completed, but you completed the records the same way as if the contract were not completed; didn't you?

The Witness: No, sir.

The Court: If you had in mind just an accrual basis.

The Witness: Well——

The Court: There is nothing different about it, is there?

Mr. Gillard: Let me ask you this question, Mr. Rosenblatt——

The Witness: Just may I say——

Q. (By Mr. Gillard): Will you turn to the job cost account; that is DB-16.

A. That's just what I am trying to locate here. These are [125] all quite out of context. Oh, 1942.

Q. Do you have DB-16, sir? A. Yes.

Q. Turn to the entries starting in January, 1943.

A. Yes.

Q. Now, do you find in those books to job costs for this Abraham Relocation Center job in January, February and March of 1943? A. Yes

Q You do, sir? A Yes.

Q. And those were charged in 1943 after the contract was completed; according to your testimony? A. That's right.

(Testimony of Samson Rosenblatt.)

Q. And they were charged to 1943?

A. That's correct.

Q. My question—Likewise, will you turn to the payroll journal?

A. It's not here. You have it over there, I think. Well, I can tell from this in here.

Q. Well, if you don't want to look at it, it's all right with me.

A. That's all right. You ask the questions.

Q. I will ask the questions. If you find charged to the payroll account to this Delta contract for January, February [126] and March—do you find charges in there for both labor and clerical help charged to 1943?

A. There are some minor charges; yes.

Q. How minor are they, sir? You tell us what the entries are from the payroll records.

A. Payroll. You want it for payroll? There is clerical; $1,700; carpenters, $525.

Q. This is for January?

A. January. Labor $925; miscellaneous, $269.

Q. There are also entries in February and March, were there, in the payroll account?

A. Clerical, $1,700; Equipment Repairs, $121; Roads, $1,000.

Q. Now, sir, will you show me or tell me where in those books those costs from the job costs account or from the payroll account for 1943 are carried back into those books and reported for 1942 as a completed job at that time? A. They weren't.

Q. They're not? A. No.

(Testimony of Samson Rosenblatt.)

Q. And those items are reported in 1943?

A. That's right.

Q. And they are chargeable to the Delta, Utah, contract?

A. Yes. In contracts you must remember that there are constantly charges to jobs which have been completed because of the fact that there are miscellaneous repairs that have [127] to be made; there is a certain amount of work that has to be done on guarantees. That is a universal procedure.

Q. Mr. Rosenblatt, weren't those entries made in January and February of 1943 prior to the closing entries of December 31, 1942?

A. No; I do not think so. They were not made.

Q. Do you think that the closing entries in 1942 were made prior to the time that the change orders were made in February of 1943?

A. I would imagine so. I don't know. They may have been, I can't tell you at this time.

Q. At least, during the period of time that you were preparing these books for closing you were at the same time making entries in 1943 chargeable to this contract? A. No, sir; I was not.

Q. In January of 1943?

A. I was not making any; Mr. Cotterrill, who was the bookkeeper, may have been making entries, but I am not aware of whether those entries were made at that time or whether they were not. I did not make those entries. That was the question you asked me.

(Testimony of Samson Rosenblatt.)

Q. You didn't personally make them, they were made under your direction?

A. No; I didn't have anything to do with them at that time.

Q. Would you say in view of those entries in January, [128] February and March of 1943 the job costs and payroll, that the contract was completed on December 31, 1942, according to those books?

A. A three-million dollar contract, they are awfully small entries.

Q. Well, if you are talking about accounting problems, Mr. Rosenblatt, or legally completed is completed, that means 100 per cent, not 99 and 44/100's per cent.

A. My understanding was that they were completed, that these were simply in a category of which I spoke.

Q. I see: Now——

A. Fulfilling a contract.

Q. Yes; and now—— A. Guarantees.

Q. Regardless of the percentage involved, sir, would you say from those books, would your say those books disclose this contract was completed on December 31, 1942?

A. The books don't disclose it: no.

Q. Thank you, sir.

(Testimony of Samson Rosenblatt.)

Redirect Examination

By Mr. McKee:

Q. Mr. Rosenblatt, as I understand your testimony, at the time the Delta contract, the Abraham Relocation Center contract was entered into, or shortly thereafter, the entire amount of the contract price was set up on the books of account, was entered in the sales journal and was distributed to several [129] accounts; among those were the job cost account and the amount that was distributed to that account was estimated job costs, there was an amount distributed to the overhead account, estimated overhead, and there was an amount shown —estimated profit and loss that was put in the profit and loss account; is that correct?

A. That's right.

Q. And I further understand your testimony that by entries made December 31, 1942, the job cost debit balance was transferred to profit or loss; is that correct? A. That's right.

Q. And did that debit balance consist of the difference between the estimated job costs and the costs which had actually been incurred?

A. That's right.

Q. Now, is it peculiar to the completed job method or completed contract method and peculiar to closing out a contract on the completed contract method that job costs will be applied against the estimated job costs leaving no actual estimated job

(Testimony of Samson Rosenblatt.)

costs to be carried over to some subsequent period, and that that difference will be written in the profit and loss?

A. I didn't quite get the context of that.

Q. As I understand you, at the time the contract was entered into, an account was set up for estimated job costs? A. That's right. [130]

Q. And that was credited to the job cost account. During the course of the contract, as job costs were incurred, job costs were debited to the job cost account. On December—by entries made December 31, 1942, that credit and any other credits that were put in there and the costs were balanced; is that right?

A. That's right.

Q. Was any estimated job costs expense, any credit from estimated job costs left to carry into some subsequent period? A. No.

Q. Isn't that a procedure peculiar to the completed contract method?

A. No; I don't think so.

Q. When you say that that isn't peculiar to the completed contract method, do you mean that it is also—that method is also used in the percentage of completed method? A. Yes.

Q. Could you explain to the Court what the percentage of completion method is?

The Court: Well, I think that has been explained already, counsel.

Mr. McKee: All right, your Honor.

Q. Is that method of keeping the books peculiar

(Testimony of Samson Rosenblatt.)

to the percentage of completion method and the completed contract method, to one or the other of them? [131]

A. I think it is peculiar—I think it is applicable to both.

Q. It's applicable to both. But it's not applicable to any other method of accounting other than the completed contract method or the percentage of completion method; is that correct?

A. No; I think you are wrong. I think it is applicable to all methods.

Q. As I understand it, the original entry which is made was the full amount of the contract, and as you say, there was a portion credited to estimated profit or loss, a portion credited to estimated overhead, a portion credited to estimated job costs; Were all those estimated amounts closed out December 31, 1942? A. Yes.

Mr. McKee: I have no further questions, your Honor.

Examination

By the Court:

Q. Mr. Rosenblatt, let me ask you this: I take it that at some time you have in mind, as an accountant, when you speak about the completed contract method as representing the degree of completion, at the time of completion you must have some fixed period; isn't that so? A. Usually; yes.

Q. At some point, somebody determines that the contract has been completed?

A. That is so. [132]

(Testimony of Samson Rosenblatt.)

Q. Now, from an accounting point of view, what does that mean? That means a time when somebody says, "We finished the work on the job," or does it mean the time when all of the obligations of both parties of the contract have been completed, including payment?

A. No; it doesn't mean—the accrued method of accounting does not mean when all obligations have been paid, your Honor; when the obligations have been incurred, all obligations—— **[132-A]**

The Court: They have been certified in some form beyond dispute at that point?

A. Well, they have to the best of the accountant's knowledge and belief; yes.

Q. So that if you were comparing an accrual method and the completed contract method they would be just the same; if the accrual method were used it would be just the same. There wouldn't be any difference, just a question of the point of time when there is maturity of the obligations, pro and con, to the point where you can put them in the book and say that represents the relationship of the parties.

A. No, sir; not my understanding. My understanding is, sir, that the accrual method of accounting envisions entry into the appropriate journals and ledger the events as they occur, in dollars and cents.

Q. Yes.

A. Put it very simply. As I understand the

(Testimony of Samson Rosenblatt.)

regulations, and as I understand the government requirements——

Q. I am not talking about the government requirements: I just want to know from the accounting point of view.

A. Well, from the accounting point of view, the accounting point of view, as I envisage it is that when the—on a percentage of completion the job—you may have entered all the——

The Court: I don't want to get into all that. All I am [133] trying to do——

A. You're asking me—I thought you wanted me to distinguish.

Q. What is the point at which the entries are made which would indicate that those entries is the final step under the completed contract method of keeping books? What point do you come to when that happens?

A. Well, on the accrual basis I'd say it would be when the accounts are closed out into profit and loss.

Q. Well, let's say that I am in the contracting business and I got a pretty good contract going along, and I make my entries in my books on the accrual basis, we will say. When do I commit myself as a matter of accounting to the completed contract method? Or is it something that I can change back and forth as, for example, if I were getting another contract at the end of the year and I would see that there may be a big profit in that contract and therefore I would be better off to

(Testimony of Samson Rosenblatt.)

close up my books on the contract that I now have, even though it is going over after the first of the year, and settle, so far as this income tax is concerned, at the end of the year?

A. I think once you make a commitment——

Q. But do you make a commitment? What is there in the books that shows that you have committed yourself to the completed contract method, and at what point?

A. Well, at the end of the fiscal year you carry over from [134] the job costs those in the succeeding years, the remaining portions of either costs or estimated costs.

Q. And that shows you haven't got the completed contracts?

A. That you have adopted the completed contract system.

Q. I can't follow you on that at all. How could that be?

Mr. McKee: If you carry over estimated costs.

The Court: Oh, I misunderstood.

A. If you carry over estimated costs or costs, any balances, that would indicate prima facie that you have adopted a completed contract basis.

But I think there are other things in here which indicate that, because I may be drawing on my knowledge——

Q. (By the Court): I thought you said in your previous testimony there was nothing in the books to show, no entry to show that this was a completed contract basis and that the reason why you closed

(Testimony of Samson Rosenblatt.)

the entries and made the income tax return not on a completed contract basis is because you thought or were informed that on December 31, the contract had been completed.

A. I was informed the contract had been completed. My understanding was that I was making a return on the completed contract basis.

Q. That is the basis upon which you did that?

A. Yes.

Q. You could equally have made a return on other than a [135] completed contract basis on December 31, too? A. Yes.

Q. Except for your statement that someone told you that the contract was completed at that time, there is nothing to show in the records any place that this was filed under the completed contract basis?

A. Well, the reason that I say——

Q. Or other than on a completed contract basis.

A. The reason that I say that that—it was filed on a completed contract basis is that I would have had no reason to accrue on the books these various charges which I started to read off, $2,000 for one, $1,000 for another of those journal entries which I started to read, which I was interrupted, but those were put in in order to reflect the job costs as closely and as clearly as I could get them at that time to show a completed contract method.

The Court: Isn't it somewhat coincidental that the contract is completed on the last day of the year?

(Testimony of Samson Rosenblatt.)

A. I don't think it was that, sir, because if my memory serves me, if my memory serves me correct I think these men and this equipment, which I have mentioned, came back either in November or December, either the latter part of November or early part of December.

Mr. McKee: Your Honor, I think he has testified it is the general practice in the accounting profession to close out [136] jobs which have been completed at any time in the year on December 31.

Q. (By the Court): When did they tell you that the contract was completed? I am asking these questions because it seems to me inconsistent with the statements of the owners of the business to the effect that the contract was not completed at that time. Why should he have told you it was completed at that time?

A. Well, as I understand it, when I went in there—my understanding, as I remember it, my understanding was that I was informed and I saw all of the equipment back, I saw all the men back, I saw various indications of the——

Q. You weren't in that close touch with the business that you followed it from day to day?

A. Not day to day; no, sir; but I did visit the job out at the Abraham Relocation Center once or twice, if I remember correctly, and I had been called on by the bookkeeper for advice, and talked to them several times during the latter months, if I remember correctly. I was in contact with—I wasn't there every day. I wasn't there once a week, but I was in occasional contact with them.

(Testimony of Samson Rosenblatt.)

Q. You see, counsel's statement and that of the witness becomes exceedingly important, in my opinion, as to whether or not there was information given to the accountant that the contract was completed. It appears completely inconsistent [137] with the statement of the owners of the business that the contract was not completed.

Now, this claim for refund must stand on the basis that the return was actually made on the basis that it was by mistake. It is a pretty unsubstantial basis for claim for refund, because I am not particularly interested too much what the technicalities are involved as I am in the essential truth and justice of the relationship of these taxpayers. That is why I have interrogated the witness.

The Court: Any other questions?

Mr. McKee: No further questions.

The Court: I make reference to this fact because I have just finished, not so long ago, trying another tax case in which somebody else made a similar mistake years after, claimed to have made a similar mistake years afterwards when the conditions were appropriate, also seeking a refund and also where their accountants handled the business and also where statements were made that seemed to be contrary to other record facts in the matter.

If there is any factual question involved in this case, aside from the question of law; why, I think the taxpayers have got a pretty big hurdle to get over in this case—if there are any factual questions. Maybe as a matter of law the matter might change, to which you can address yourselves in the briefs.

(Testimony of Samson Rosenblatt.)

There may be other aspects to the case that [138] may otherwise determine, but I thought I might let you know about that now.

Is there any other evidence in the case?

Mr. Gillard: I just want to ask Mr. Rosenblatt a couple more questions, if the Court please.

Recross-Examination

By Mr. Gillard:

Q. Mr. Rosenblatt, you indicate you were in fairly close touch with the work on this job and that you had been up to Delta, Utah, upon occasion; is that correct?

A. I think it was once or twice; I am not sure.

Q. Once or twice?

A. I know I was up there at least once.

Q. You talked about the job and the progress of the job with Mr. Daley; did you?

A. I talked with all the people. I talked with Mr. Cotterrill, I talked with Mr. Carr, Mr. Rigby, several—quite a few of them.

Q. Were you aware of the fact that Daley Bros. were behind schedule in the performance of this contract? A. No.

Q. You were not aware, sir? A. No.

Q. Did anybody ever tell you they were behind schedule on this contract? A. No. [139]

Q. You have examined, for the purpose of keeping the records, the contract and all the change orders thereto?

(Testimony of Samson Rosenblatt.)

A. Well, I examined change orders with respect to the amounts of money, and so forth.

Q. You did not examine, for example, change order No. 10 which increased the time within which to complete the contract for a period of 73 days on December 5, 1942?

A. No; I didn't see that. In quite a number of instances the date that the change order bears does not mean that it was released at that time.

Q. I see. Were you aware of the fact, sir, that this change order dated December 10, 1942, extended the time for completion of this contract by reason of delays caused in the performance of the contract by virtue of the priority system for a total of 73 days to February 16, 1943?

A. No; I was not.

Q. You were not aware of that fact?

A. No.

Q. Would you make a fact computation and see how far off December 5 is from February 16, if you add 73 days to December 5? A. 73 days.

Q. All right. Now, sir, did you visit the project up there in December of 1942? A. No. [140]

Q. When did you visit it?

A. I don't remember what time I visited it. I visited it. I can't tell you.

Q. It is your testimony that men and equipment were returning to San Francisco in November of 1942?

A. I said either the latter part of November or the early part of December.

(Testimony of Samson Rosenblatt.)

Q. Or the early part of December; and in the early part of December the contractor is up there with the engineers arguing and praying for a 73-day extension because he can't complete his contract, has a penalty to face if he does not complete it on time.

A. I don't know whether he was there or not at that time.

Q. You think a change order for 73 days was given for him without request?

A. I don't imagine it was, but it may have been in the making for several weeks prior to that time. I don't know.

Mr. Gillard: I have no further questions.

Mr. McKee: Your Honor, may I offer in evidence the four account books? I do think that on brief we can, by referring to several entries, that will not be difficult for your Honor to——

The Court: You can, either side may refer to anything you want in the books: it is perfectly all right.

Mr. McKee: Thank you. [141]

The Court: Is that agreeable to you?

Mr. Gillard: Yes, your Honor, unless you want to have some testimony as to how this contract was set up and carried forward in the books. I have brought a certified public accountant from the Internal Revenue with me. Mr. Rosenblatt apparently is unable to do so, not familiar enough with the books, to indicate to you how this thing was done.

(Testimony of Samso. Rosenblatt.)

I thought if you were interested in that phase of it——

The Court: I can't tell. I have no particular interest in any phase of the case. That is a matter that counsel will have to determine. Whatever you think is material to the case, why, it is a matter for counsel to determine as to what you want to put on.

Are you finished with this witness now?

Mr. McKee: I am.

Mr. Gillard: Yes, your Honor.

The Witness: Thank you. [142]

* * *

The Court: What is the main point you rely upon: that this was a return upon which tax was paid on an accrual basis as distinguished from a completed contract basis on the ground that the parties thought that the contract was completed and that the annual return corresponded with the completed contract period and they thereafter discovered that was not the case?

Mr. McKee: Your Honor, as a matter of law, a taxpayer, on the completed contract method, is not permitted to change his accounting method. He must report the profit from all [144] contracts——

Mr. Gillard: That is arguable. The Commissioner accepted the return made by the taxpayer.

Mr. McKee: That is a matter which I intend to brief—and that he must report the income, it is

our position, in the year in which the contract is completed. Now, it has been stipulated, and I don't think it is disputed, this contract was completed in 1943 and we hope to prove in our brief to your Honor's satisfaction.

The Court: The Government hasn't disagreed on that, the question of whether this is a return that was based upon the contract, whether you would be given permission to file an amended return.

Mr. McKee: But the point is that regardless of how the return was originally filed, as a matter of law we are required and entitled to report our income on the basis of—for the year in which the contract was completed. This contract was completed in 1943.

The Court: There is no law, is there, that requires that a man having contracts has to file a return on a completed contract basis?

Mr. McKee: If he has adopted that method in the past, the rule is he must consistently maintain it in reporting income. He cannot change from year to year. If he could, your Honor, he would always change in such a way as to reduce his total tax liability. Consistency is the principal requirement in [145] connection with accounting for tax purposes and that is the principal matter which we would like to brief.

The Court: Well, the question is whether or not the returns were filed on the completed contract basis.

Mr. McKee: That is one of the questions, your Honor. It has been stipulated that returns for

prior years were on a completed contract basis and that the books were kept in that manner.

The Court: The returns that were filed don't show it on their face.

Mr. McKee: They show an X with an accrual, that is true. It says cash or accrual, and one or the other has to be checked, and it has been testified to that the entries made in these books in job costs, for example, were made as the account accrued, as the debts accrued.

The Court: Well, isn't that perfectly consistent with the ordinary accrual basis?

Mr. McKee: It is perfectly—excuse me!

The Court: Isn't that equally perfectly consistent with an ordinary accrual?

Mr. McKee: It certainly is. It doesn't prove the case one way or the other.

The Court: So there is really nothing to indicate here that the books for this year were kept on a completed contract basis, except somebody's [146] say-so.

Mr. McKee: There is also the testimony that——

The Court: Of course, that say-so comes retrospective.

Mr. McKee: There is also testimony, your Honor, that the estimated job cost account was established, that estimated job costs were put into the job costs, and that at December 31 job costs actually incurred were offset against the estimated job costs and written to profit and loss.

The Court: Of course, the cynic would probably inquire: What might have happened if there was a

very large and substantial income in 1943 with respect to whether or not the amended returns in 1947 were filed?

Mr. McKee: I think that can be looked at in another way, too, your Honor, that the returns as shown show very large income in 1942 and negative income in 1943. Therefore, that taxpayer pays a great deal more tax than one whose income was reported half and half.

The Court: Well, the taxpayer presumably elects to, as he has a perfect right to, the method which will best serve his purpose and which will be most economical to him. That is his right. We can assume that the taxpayer does that.

Mr. McKee: But the taxpayers are not always aware of what their rights are. [147]

* * *

[Endorsed]: Filed March 29, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein, as designated by attorneys for the appellant:

Excerpt from Docket Entries.
Complaint.
Answer of Defendant.
Stipulation of Facts.
Substitution of Attorneys.
Supplemental Stipulation.
Opinion and Order for Judgment.
Findings of Fact and Conclusions of Law.
Judgment.
Notice of Appeal.
Appeal Bond.
Appellants' Designation of Record on Appeal.
Reporter's Transcript of Proceedings, Sept. 28, 1955.
Plaintiffs' Exhibits: 1, 2, 3, 4, 5, 6 and 11.
Defendant's Exhibits: A, B, C and D.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 29th day of June, 1956.

C. W. CALBREATH,
Clerk;

By .....,
Deputy Clerk.

[Endorsed]: No. 15181. United States Court of Appeals for the Ninth Circuit. John P. Daley, Minerva B. Daley, Morris Daley, Zelma B. Daley, William Radtke, Clara Radtke and Homer Bosse, Trustee of the Estate of Morris K. Daley; Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 15181

JOHN P. DALEY, MINERVA B. DALEY MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS

Appellants herein hereby file a Statement of Points on which they intend to rely, which are as follows:

1. The District Court erred in finding that Daley Brothers Delta War Venture elected to report income for the year 1942 on the accrual basis of accounting. The full contract price of the War Department contract, which was the only contract performed by Daley Brothers Delta War Venture, was included in income for 1942, even though $472,722.15 of that contract price had not accrued by December 31, 1942. This is inconsistent with the accrual basis of accounting and did not con-

stitute an election to report income on the accrual basis of accounting. The manner in which income was reported demonstrates that the income was reported on the completed contract method of accounting. Appellants should have been allowed refunds of income taxes paid by them, based upon income determined in accordance with the completed contract method of accounting correctly applied.

2. If the Daley Brothers Delta War Venture elected to report the income for 1942 from the War Department contract on the accrual basis of accounting as the District Court found, the appellants should have been allowed to correct errors in the return filed for 1942 by Daley Brothers Delta War Venture which the Court found to exist by reporting all of the income and deductions applicable to such contract in 1943 when the contract was completed.

3. The District Court erred in finding that the grounds stated in the refund claims, and the basis asserted in the complaint for refund, were solely that all of the receipts from the War Department contract had been erroneously reported as income in 1942. Said claims for refund and said complaint both set forth as grounds for the refund, that income from the War Department contract was reported before it was earned, and the District Court so found. Appellants should have been allowed refunds based upon computations eliminating items of income and deductions not properly accruable in

1942 and transferring such items to 1943 when such items were properly accruable.

* * *

Dated: San Francisco, California, July 2, 1956.

/s/ ERIC SUTCLIFFE,

/s/ WILLIAM D. McKEE,

ORRICK, DAHLQUIST, HERRINGTON & SUTCLIFFE,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 3, 1956.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 288

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. Daley, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. _____

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE and HOMER BOSSE, Trustee of the Estates of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley and Peter D. DALEY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on April 18, 1957.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 243 F. 2d 466, is set forth in the Appendix, p. 1a. The opinion of the United States District Court for the Northern District (Southern Division) of California is set forth in the printed record below at page 102.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on the 18th day of April, 1957. The jurisdiction of this Court is invoked under Section 1254(1), 28 U.S.C. of the Judicial Code.

QUESTIONS PRESENTED

1. Whether the courts below erred in finding that the Delta Venture return was filed under the accrual basis of accounting and did not use the completed contract method of reporting income.

2. Whether the courts below erred in holding petitioners' refund claims insufficient to support a refund based upon the trial court's finding of the improper accrual of income in 1942 reportable in 1943.

3. Whether, if the claims for refund were considered defective,

   (a) were such defects waived by the Respondent's conduct and knowledge of the basis for the claims, and if not, should the petitioners be permitted to offer evidence to show such waiver, and

   (b) were such defects cured or waived by the pleadings and/or a supplemental stipulation for refund based upon the court's findings. [R. 101]

STATUTES INVOLVED

The pertinent portions of Sections 41, 42 and 43, and Section 3772, of the Internal Revenue Code of 1939 are set forth in the Appendix, p. 18a.

STATEMENT OF THE CASE

Petitioners were members of a joint venture known as Daley Brothers Delta War Venture which undertook a single contract for construction. The Venture commenced the performance of the contract with the United States on July 8, 1942, and completed it on February 16, 1943. On March 15, 1943, the Venture filed a partnership information income tax return for the calendar year 1942. The individual petitioners filed individual income tax returns for 1942 based on the 1942 Venture return.

The books of the Venture were kept by Daley Brothers, Ltd., one of the members of the Venture. Daley Brothers, Ltd. since 1935 had filed tax returns using the completed contract method, the books employing the accrual basis of accounting. The 1942 information return filed by the Venture reported all receipts and all disbursements, actual and anticipated, under the contract as though all such receipts and disbursements had been properly paid or accrued in 1942 and as if the contract had been wholly completed by December 31, 1942. The return was erroneous, whether upon the completed contract method or upon a strict accrual basis of reporting income.

In 1947 the Venture filed amended information income tax returns for 1942 and 1943, accompanied by refund claims by the distributees of the Venture's net income, petitioners herein (R. 86-95). The original

and the amended returns indicated the "accrual" basis. The refund claims did not refer to either the completed contract method or the accrual basis. The purpose was to correct the 1942 return by showing the contract receipts in 1942 as "advances" and correctly to accrue receipts and disbursements and gross profit in the year 1943, the year of completion of the contract. The intent was to file a proper return, to correctly report income in the year earned, as required by law. The effect of this change would result in tax refunds upon the returns of the petitioners for 1943. The claims for refund were denied by the Commissioner. Under the provisions of Title 28 U.S.C. 1346(a)(1)(ii), suit was brought in the United States District Court for the Northern District of California, Southern Division, which Court on February 29, 1956, decided against the petitioners (R. 102). Findings of Fact, Conclusions of Law, and Judgment were entered on March 23, 1956 (R. 107-113). Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, which, by Opinion filed April 18, 1957, affirmed the District Court.

The District Court held that

> "* * * all of the income from the contract was intentionally reported as accruing during the year 1942, although a portion of the income from that contract did, in fact, accrue in 1943 * * *" (R. 110)

The District Court further found, as a conclusion of law, that the Venture

> "* * * elected to report the income from the War Department contract for the year 1942 on the accrual basis of accounting. That portion of the income from the contract that *actually accrued in 1943 cannot be refunded in this action* because

the grounds stated in the refund claims, and the basis asserted in the complaint for refund, were solely that *all* of the receipts from the contract had been erroneously reported as income in 1942 * * *" (R. 111). (Italics supplied)

The District Court found that *some* of the contract income did not in fact accrue until 1943, and therefore was improperly reported as 1942 income, but denied recovery of the overpayment on grounds of insufficiency of the claims for refund. The amount of such income improperly reported in 1942 was $472,722.15. The Court of Appeals refused to remand the case for computations on the basis of the accrual method, and to afford petitioners opportunity to submit evidence that respondent was at all times, through conferences and documentary material, fully apprised of the improper accruals and the claims for refunds based thereon. Respondent had notice that the original and amended returns of the Venture were filed on the accrual basis. The returns so indicated (R. 86-90). Respondent's counsel in the trial court so contended (R. 127, 136). Respondent contended that the accrual method of accounting was properly applied and that the returns were substantially correct on the accrual theory; that substantially, if not all, of the contract income was earned in 1942.

REASONS FOR GRANTING THE WRIT

Petitioners assert that certiorari should be granted in this case for the reasons:

(a) The decisions of the District Court and the Court of Appeals in this case are in conflict with applicable decisions in this court. *Helvering* v. *Enright*, 312 U.S. 636; *Spring City Foundry Co.* v. *Commis-*

sioner, 292 U.S. 182; *Aluminum Castings Co.* v. *Routzahn*, 282 U.S. 92; *Weiss* v. *Weiner*, 279 U.S. 333; *Old Colony R.R.* v. *Commissioner*, 284 U.S. 552; as to sufficiency of claim or waiver of defects, see *Tucker* v. *Alexander*, 275 U.S. 228; *U.S.* v. *Garbutt Oil Co.*, 302 U.S. 528.

(b) If previous decisions are not directly applicable to this case, then the courts below have decided an important question of Federal law which has not been, but should be, fully settled by this court.

The courts below became confused with the technical details and distinctions of the accrual method of accounting and the completed contract basis of reporting taxable income.

Athough the District Court found that the Venture "elected" to file a 1942 return on the accrual basis, and found that all of the contract income had been included in the 1942 return, it still concluded that this did not represent the completed contract method of reporting income. The District Court explains away this error by finding that the Venture's 1942 return erroneously reported $472,722.15 of income which should have been accrued and reported in 1943. And although the courts below experienced no difficulty in discovering the erroneous reporting of such income, on the basis of a comparison of the original and the amended returns and the Exhibits and stipulations, both courts found that the Commissioner of Internal Revenue was not sufficiently apprised of the grounds for the refund claims. The petitioners find themselves in the dilemma of being required by the Court to state as a ground for refund a specific reason or theory which did not exist until the District Court entered

its findings, conclusions and opinion. The opinions below seem to imply that the petitioners made a mistake in the 1942 return and should be denied the right to correct the mistake because the correction would result in a tax refund. The returns were prepared by an accountant who testified he thought they were correct (R. 218-219). The Internal Revenue Service would not accept such a theory if the situation were reversed, but would insist upon a true and clear reflection of income where the result would be additional taxes.

The original return for 1942 was filed upon the accrual basis of accounting and was intended to follow the completed contract method of reporting income. It was incorrect in that it improperly accrued income reportable in 1943 and in that it employed the completed contract method to report income upon a contract not actually completed until February 16, 1943 at the earliest. The amended returns for 1942 and 1943 were filed to correct both errors. Clearly on the face of the amended returns $472,722.15 of income had been erroneously included in the 1942 return on the accrual basis and correctly included in the 1943 amended return. The claims for refund (R. 86-90) when considered in conjunction with the accompanying amended returns, set forth sufficient explanation and reasons for the refunds resulting from a correction of the erroneous reporting of income from the Delta contract. In any event the Commissioner's representatives had actual knowledge that petitioners, as an alternative to the completed contract method of accounting as a basis for recovery, contended that even under the accrual method of accounting petitioners were entitled to the refunds, inasmuch as $472,722.15 did not accrue in fact or in law until 1943.

The reasoning of the District Court, concurred in by the Court of Appeals is that petitioners should have alleged that only *part* of the income, $472,722.15, rather than *all* of the income from the Delta contract, was erroneously included in 1942. The courts have never required such refinement and precision in a claim for refund. The Respondent had ample opportunity to make administrative review and decisions between the filing of claims in 1947 and the filing of suit in 1952. Respondent consistently took the position that the books and returns were on the accrual basis and the returns were correct. In the Court of Appeals Respondent contended that even if the accrual reporting was in error the taxpayers were estopped by a so-called "election" and could not obtain a refund as the result of attempting to correct the error. Petitioners contend they themselves were the ones misled and taken by surprise by the Respondent's conduct in raising for the first time in the trial court highly technical objections to the form of the claim.

As to the sufficiency of the claims for refund, petitioners cite the following cases: *Tucker* v. *Alexander*, 275 U.S. 228; *U. S.* v. *Garbutt Oil Co.*, 302 U.S. 528; *U. S.* v. *Andrews*, 302 U.S. 517; *U. S.* v. *Memphis Cotton Oil Co.*, 288 U.S. 62; *Hrcka* v. *Crenshaw*, 237 F. 2d 372; *Howbert* v. *Penrose*, 38 F. 2d 577, at 581; *Underwood* v. *Commissioner*, 56 F. 2d 67; *Commissioner* v. *Wells*, 132 F. 2d 405; *Lehigh & Wilkes-Barre Coal Co.* v. *U. S.*, 38 F. 2d 637; *Reynolds* v. *McMurray*, 77 F. 2d 740; *U. S.* v. *Elgin National Watch Co.*, 66 F. 2d 344; *U. S.* v. *Humble Oil & Refining Co.*, 69 F. 2d 214; *Foster Box Board Co.* v. *Clarke*, 7 F. Supp. 682; affirmed 90 F. 2d 1008; *Smale & Robinson, Inc.*

v. *U. S.*, 123 F. Supp. 457; *Clark* v. *U. S.*, 143 F. Supp. 165; *C. W. and Mattie Stillwell* v. *U. S.*, U.S.D.C., Western District of Virginia, Docket 546, decided May 23, 1957, appeal pending.

CONCLUSION

Regardless of the terminology used or the precision of language in the claims or returns, the simple situation is that petitioners (a) filed incorrect returns for 1942, reporting *all* Delta income; (b) filed timely amended returns and claims for refund to correct the error; and (c) proved that *at least* $472,722.15 had been incorrectly reported in 1942 instead of 1943. Therefore this court should grant certiorari to review the errors committed below in denying any relief to petitioners under all the circumstances.

Wherefore petitioners pray that a writ of certiorari may issue directed to the United States Court of Appeals for the Ninth Circuit and upon review, that the judgment of said Court of Appeals be vacated, reversed and set aside and that this case be remanded to said court with instructions to proceed further in accordance with the opinion of this court.

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sufficient to apprise the Commissioner of the exact basis thereof." *Rogan* v. *Ferry*, 9 Cir., 1946, 154 F. 2d 974, 976.

See U.S. Treas. Regs. 111, § 29.322-3 (1943): *French* v. *Smyth* (N.D. Cal., 1952), 110 F. Supp. 795, and cases therein collected, *aff'd sub nom. French* v. *Berliner*, 9 Cir., 1955, 218 F. 2d 351.

It is urged that an examination of the refund claims, together with the accompanying amended returns, demonstrate that the improper accrual of receipts was set forth as a ground for refund.

The identical refund claims read in part:

> "... The amended returns are to correct the Delta, Utah, contract, which was completed in the year 1943 and erroneously included in income for the year 1942. ..."

No mention is made of the improper accruals alleged to be in issue, but reference is made to accompanying amended returns. Appellants compare the original 1942 return showing gross receipts of $3,655,672.28 with the amended return for 1942 showing "advances" of $3,180,536.97. The item in question, $472,722.15, if added to the "advances" figure on the amended 1942 return, would total $3,653,259.15, the total contract price. Thus, it is said that a comparison of the two returns discloses that the final progress payments and "holdbacks" from 1942 progress payments were improperly accrued as 1942 income.

This discrepancy is not sufficient to apprise the Commissioner of the improper accruals, because the amended return is consistent with, and solely indicative of, a proper application of the completed contract method. The foregoing, taken together with the statement in the refund claim, fortifies the conclusion that the only stated basis for refund was upon the theory of an application of the completed contract method.

Appellants also contend that the allegations of the complaint sufficiently set forth the improper accruals, which in the face of a failure of the Commissioner to raise the inadequacy of the refund claims in his answer, require a recovery. Paragraph IX of the complaint is pointed to as being sufficient; it reads:

> "That at the end of the calendar year of 1942, an income tax return was made for the special partnership, notwithstanding the fact that the contract was not completed and accepted before December 31, 1942, and said income tax return was erroneously made and reported under the mistaken theory that the income was earned in the calendar year 1942. This income was then inadvertently reported by the plaintiffs as income as to their respective shares by the plaintiffs herein on their individual returns for said year."

The statement is no more than an allegation of appellants' reliance on the completed contract method, and does not ask a refund on the theory of an improper accrual of two particular items. In a word, appellants advised the Commissioner in their claims for refunds that all of the income from the contract should have been reported in 1943, on a completed contract basis. They did not advise the Commissioner that *certain items of 1943 income* were improperly included in the 1942 return.

Appellants further contend that Rule 54(c) of the Federal Rules of Civil Procedure would allow recovery irrespective of the defective refund claims. As we read the rule,[9] it cannot remedy an existing defect in a refund claim,

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[9] Fed. R. Civ. P. 54(c) provides:

> "(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

and cannot provide a recovery where the grounds are not stated in the refund claim.

Appellants urged for the first time upon appeal that the Commissioner has by his conduct waived any defect in the refund claims. We cannot remand this cause to the trial court when the issue could have been litigated during the trial.

Even though, as we have heretofore pointed out, the appellants did elect to use the accrual accounting method, that method is not binding upon them, if it fails clearly to reflect income from the Delta contract. Appellants contend that it does not, and that they may therefore employ the completed contract method of accounting in reporting income from the Delta contract. In the event a taxpayer elects a method of reporting income which does not clearly reflect income, the Commissioner is free to recompute the income in accordance with a method which does so;[10] likewise, it is argued that the taxpayer is not bound by an election to report income upon a method of accounting which does not clearly reflect income.[11]

That proposition cannot afford appellants any comfort in the instant case. The accrual method clearly reflects income from the Delta contract.

Appellants' first contention on this phase of the case is bottomed upon the assumption that the two items improperly accrued as 1942 income, viz.: the 1942 "holdbacks" and the 1943 progress payments, a total of $472,722.15, distort the true income picture. The fact that appellants erroneously included said amounts in the 1942 income return, rather than as 1943 income, is not sufficient to demonstrate that the accrual method does not truly reflect income. The

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[10] Int. Rev. Code of 1939, §41, 53 Stat. 24.

[11] Lebolt & Co. v. United States, 1929, 67 Ct. Cl. 422; accord, Ross v. Commissioner of Internal Revenue, 1 Cir., 1948, 169 F.2d 483.

erroneous application of an accounting method by a taxpayer cannot be said to transform that method from one which clearly reflects income into one that does not.

Appellants then argue that the accrual method, *properly applied,* would not clearly reflect income from the Delta contract.

It must be realized that the completed contract accounting procedure is not operative until the net income or loss is determined; and its use is not characterized by the entries in the primary accounts. Either the cash receipts and disbursements method or an accrual method can be employed in the primary accounts of a concern electing to report taxable income upon the completed contract basis.

Many accounting procedures can be grouped under the definition of accrual accounting. See, *e.g., Maloney* v. *Hammond,* 9 Cir., 1949, 176 F. 2d 780. Essentially, an accrual method recognizes income when the taxpayer has an unrestricted right to the money,[12] and deductions are taken when "'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period."[13] Taxable income is reported upon an annual accounting concept.[14]

With respect to the Delta contract, the items of income consisted of the partial progress payments paid at the end of each calendar month upon approved estimates and ten per cent "holdbacks" from those progress payments, paid upon completion and acceptance of all the work done under

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[12] Spring City Foundry Co. v. Commissioner, 292 U.S. 182; Estate of Putnam v. Commissioner, 324 U.S. 393; Dixie Pine Products Co. v. Commissioner, 320 U.S. 516; U.S. v. Anderson, 269 U.S. 422; Continental Tie & L. Co. v. U.S., 286 U.S. 290.

[13] Int. Rev. Code of 1939, § 43, 53 Stat. 24; see U.S. Treas. Regs. 111, § 29.43-1 (1943).

[14] Burnet v. Sanford & Brooks Co., 282 U.S. 359.

the contract.[15] Under an accrual accounting method, the partial progress payments would accrue in the year when the right to receive the payments ripened with certainty.[16] The remainder of the contract price would not accrue until the completion and acceptance of the contract.[17] Costs would be apportioned over the contract price, and the costs applicable to the income accrued at the end of 1942 would be deducted in that year. *Accord, U.S.* v. *Anderson*, 269 U.S. 422; see Wagman, *Tax Accounting for Long-Term Contracts*, 33 Taxes 277.

As a matter of practice, either the completed contract or the percentage of completion method might be preferable to a more traditional accrual accounting system and might reflect income more accurately. But we cannot agree that an accrual method, reporting upon a fiscal year and accruing income and spreading deductions as hereinbefore stated, would not clearly reflect income from the Delta contract. The Venture elected to report taxable income upon an annual accrual basis, and is bound by its election.

Affirmed.

(Endorsed:) Opinion. Filed Apr. 18, 1957.

PAUL P. O'BRIEN, *Clerk*.

Sec. 41 [Internal Revenue Code]. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such

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[15] See note 1, supra.

[16] Clark v. Woodward Const. Co., 10 Cir., 1950, 179 F.2d 176.

[17] Daily v. Commissioner, 9 Cir., 1955, 227 F.2d 724.

method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

Sec. 42 [Internal Revenue Code]. (a) GENERAL RULE.—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death.

Sec. 43 [Internal Revenue Code]. The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death.

SUITS FOR REFUND

Sec. 3772 [Internal Revenue Code]. (a) LIMITATIONS.—

(1) CLAIM.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

No. 288

In the Supreme Court of the United States

October Term, 1957

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE AND HOMER BOSSE, TRUSTEE OF THE ESTATES OF MORRIS K. DALEY, ALICE M. DALEY, SUSAN R. DALEY, JAMES D. DALEY, KATHRYN F. DALEY AND PETER D. DALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the District Court (R. 102-112) is reported at 139 F. Supp. 376. The opinion of the Court of Appeals (Pet. 1a-18a) is reported at 243 F. 2d 466.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1957. (R. 275:) The petition for a writ of certiorari was filed July 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that the District Court was not clearly erroneous in finding that a joint venture intentionally elected to compute and report the income from a construction contract by means of the accrual method of accounting rather than the completed contract method.

2. Whether the Court of Appeals erred in holding that taxpayers could not correct the joint venture's accrual computation in this action, inasmuch as the taxpayers' claims for refund and complaint were based on a different ground, and were insufficient to raise the question of adjustment of the accrual computation.

3. Whether the Court of Appeals abused its discretion in refusing to remand the cause for a finding with respect to the question of whether the Commissioner, by his conduct, waived the defects in the claims, where the question was raised for the first time on appeal and could have been litigated during the trial.

4. Whether taxpayers may raise the question of whether defects were cured or waived by a supplemental stipulation for refund when that question is raised for the first time in this Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 41, 42(a), 43 and 3772(a) of the Internal Revenue Code of 1939, and of Sections 29.42-4 and 29.322-3 of Treasury Regulations 111 are set forth in the Appendix, *infra*, pp. 14-17.

STATEMENT

The facts as found by the District Court (R. 107-110) and as stipulated (R. 16-24) may be summarized as follows:

John P. Daley and Morris Daley were engaged in a general contracting business as copartners, operating under the firm name of Daley Brothers. On June 30, 1942, John P. Daley and Morris Daley, as general partners, formed a limited partnership with Homer Bosse, trustee for the benefit of the Daley's children, as limited partner, and the business which previously had operated under the firm name of Daley Brothers was continued as Daley Brothers, Limited. On July 8, 1942, the limited partnership entered into a Government construction contract. Upon the securing of this contract, Daley Brothers, Limited, entered into a joint venture with William Radtke, which was called the Daley Brothers Delta War Venture (hereinafter called the joint venture), for the purpose of performing the contract. (R. 18-19, 108.)[1]

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[1] Petitioners in this case are John P. and Minerva B. Daley, husband and wife; Morris and Zelma B. Daley, husband and wife; William and Clara Radtke, husband and wife, and Homer Bosse, trustee of the estates of Morris K.,

The contract called for a lump sum consideration of $2,834,212.51, and was to be completed on or before September 6, 1942. (R. 19.) A series of supplemental agreements increased the consideration for the contract to its final amount of $3,653,259.12, and extended the date of completion to February 16, 1943. The contract was in fact completed and the work accepted by the Government as of this date. (R. 19-21.)

The joint venture filed a separate partnership income tax return for the period June 1, 1942, to December 31, 1942, reporting the full contract price ($3,655,672.28) as gross income and distributing net income in the amount of $206,250.44 between Daley Brothers, Limited, and William Radtke. (R. 22; Ex. 18, R. 86-87.)

In 1947, the joint venture filed amended partnership income tax returns for 1942 and 1943, in which it reported no income from the contract in 1942 and the entire receipts from the contract in 1943. Along with these amended partnership returns, taxpayers filed claims for refund and amended individual tax returns reflecting the changes made by the partnership returns. (R. 109-110.) The claims for refund asserted that the amended income tax returns filed in 1947 were consistent with the accounting procedure followed by the Daley Brothers partnership

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Alice M., Susan R., James D., Kathryn F. and Peter D. Daley, all of whom are joined as a result of filing individual income tax returns reflecting shares of income from the Delta War Venture. (R. 17-18, 22-24.)

during 1943 and prior years,[2] and were to correct the original returns which erroneously reported the income from the contract in 1942, while the contract was completed in 1943. (R. 94, 99, 109-110.) On rejection of these claims (R. 96, 100), taxpayers filed a complaint in the District Court, which alleged that the accountant for the joint venture acted under the mistaken assumption that the monies received under the contract were income for the year 1942, and that such monies were not income until the next year, when the contract was completed and accepted. The complaint further alleged that, at the end of the calendar year 1942, an income tax return was made for the joint venture, notwithstanding the fact that the contract was not completed and accepted before December 31, 1942, and that the tax return for 1942 was erroneously made and reported on the mistaken theory that the income was earned in 1942. (R. 10-11.)

The Government rejected the claims and opposed the action on the ground that the joint venture did not err in applying the completed contract method, but in fact had adopted the accrual method. (R. 105.) The District Court found that, at the time the 1942 return was filed, taxpayers and their accountant[3] knew that the contract was not completed until 1943, and that the reporting of all of the re-

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[2] The partnership in prior years had reported income from other contracts on the completed contract basis. (R. 18.)

[3] The District Court observed (R. 106) that the testimony of the accountant was not credible.

ceipts from the contract was not the result of a mistaken belief on the part of anyone that the contract was completed in the earlier year. The court also found that the taxpayers, on the partnership return and in a form submitted to another governmental agency, stated that the basis used in reporting revenue from the contract was the accrual basis. Accordingly, the District Court held that the accrual method of accounting was elected by the joint venture. (R. 109, 110.)[4] In addition, although the point was not in issue, the court further noted that it did appear that certain errors existed in taxpayers' accrual computation, but held that, since taxpayers' refund claims and complaint sought refunds solely on the ground that all of the contract receipts had been erroneously reported as income in 1942 as a result of a mistaken application of the completed contract method of accounting, any error resulting from a mistaken application of the accrual method could not be reached or corrected in this action. (R. 104-105, 106, 111.)

The Court of Appeals affirmed the finding of the District Court that taxpayers intentionally reported the income from the contract in their 1942 tax returns on the accrual basis. (Pet. 13a.) The court, agreeing with the District Court, also held that the refund claims, amended returns, and complaint did not set forth the correction of taxpayers' computa-

[4] The court further observed (R. 106) that taxpayers' financial status at the end of 1943 made it advantageous *ex post facto* to shift the contract income to 1943.

tion of their income on the accrual basis as an alternative ground for recovery, and refused to remand the case for a determination of the amount of refund due because of asserted errors in taxpayers' accrual computation." (Pet. 13a-15a.) The Court of Appeals further held that it would not remand the case to the District Court to consider taxpayers' assertion that the Commissioner, by his conduct, waived any defect in the claims inasmuch as such contention was urged for the first time on appeal and could have been litigated in the trial court. (Pet. 16a.)

ARGUMENT

1. Sections 41, 42, and 43 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 14-15) set forth the general rules with respect to the permissible methods of accounting for income tax purposes, and specifically recognize and authorize the cash basis and accrual basis as the two principal methods of recording and reporting items of income and expense. In addition to these methods, Section 29.42-4 of Treasury Regulations 111 (Appendix, *infra*, pp. 15-16) allows persons whose income is derived in whole or in part from "long-term" construction contracts to elect to report the gross income from such contracts upon the completed contract method. Under this method, the gross income from the contract is reported in the period in which the contract is finally completed and accepted, and all expenditures allocable to the contract are deducted in the same period.

It is clear that the first question presented (i. e., whether taxpayers elected to compute and report the income from a construction contract by means of the accrual method or by the completed contract method) is entirely factual. There was substantial evidence upon which the District Court based its finding and conclusion (R. 110, 111) that taxpayers elected to report on the accrual method, and the Court of Appeals, in a careful review of this evidence, affirmed this finding. (Pet. 5a-13a.) The issue clearly presents no question for review by this Court. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214.

2. Taxpayers, in the alternative, and for the first time, contended in the Court of Appeals that, since they were held to have reported their income on the accrual basis, they should be permitted to correct certain errors in their accrual computation, and that the case should be remanded to determine the amount of refund due them on this ground. (Pet. 13a.)

The District Court had stated (R. 106, 111) that it appeared that some of the income from the contract in question in fact did not accrue until 1943 and was improperly included in taxpayers' 1942 returns. But the court noted that this error could not be reached or corrected in this action since the taxpayers did not present the correction of its accrual computation as a basis for refund in their refund claims or in their complaint. Taxpayers, instead, sought refunds solely on the ground that they elected to report on the completed contract method, and that all the income should be shifted to 1943 since the contract was not completed until 1943. The correctness of the accrual computations was not placed in issue at any time prior to, during, or after the trial, and the District Court's observations with respect thereto are merely dicta.

It is well-settled that a suit for refund of taxes must be based on a claim for refund previously filed with the Commissioner and that the claim must set forth in detail each ground upon which a refund is claimed, with sufficient facts to apprise the Commissioner of the exact basis thereof. Recovery can only be had on grounds presented to, or considered by, the Commissioner. Section 3772(a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 15); Section 29.322-3 of Treasury Regulations 111 (Appendix, *infra*, pp. 16-17); *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293, 297-298; *Real Estate Title Co.* v. *United States*, 309 U. S. 13, 17-18; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 69-72. Here, as both the District Court (R. 106, 111) and the Court of Appeals (Pet. 13a-15a) found, the refund claims and the taxpayers' complaint[6] were based on the ground that taxpayers had in fact elected to use the completed contract method, had erroneously reported the contract receipts in 1942, and desired a refund based upon shifting all of the income to 1943. There was nothing presented to apprise the Commissioner that taxpayers sought a refund on the basis of an adjustment of assertedly erroneous accrual computations. The question of the basis of the taxpayers' claim is factual, and the concurrent findings of the two courts below should be considered final. *Comstock* v. *Group of Investors*, *supra*.

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[6] As well as the amended tax returns filed with the claims (Pet. 14a), the offers of proof at the trial, and the briefs filed in the trial court.

3. The question of whether the Commissioner by his conduct or knowledge waived the insufficiency of the claims likewise presents no question for review by this Court. The Commissioner, prior to the expiration of the statute of limitations for the filing of claims, can waive a defect in a claim for refund. See *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 533; *Tucker* v. *Alexander*, 275 U. S. 228. The Court of Appeals, however, properly did not pass on the merits of taxpayers' assertion that the Commissioner, by his conduct and knowledge, waived the defect in the claims,[7] and the merits of the contention should not be considered by this Court. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327. The Court of Appeals also properly acted within its discretion in refusing to remand the cause to the trial court to enable taxpayers to offer evidence of a waiver, since the particular issue could have been litigated at the trial. Cf. *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, 313; *Pennsylvania Railroad Co.* v.

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[7] Because taxpayers raised the question of waiver for the first time on appeal, the record presents no evidence with respect to the Commissioner's knowledge or conduct prior to the trial. The record clearly shows that the only issue litigated during the trial was whether taxpayers elected to use the completed contract basis and, if so, when the contract was completed. Furthermore, there was no waiver of the defects in the claim; the claims, and the amended returns attached thereto (as well as the complaint and conduct of the trial), specifically directed the Commissioner's attention to this sole issue and the Commissioner was entitled to take it at face value and was not required to examine another ground at odds thereto. *United States* v. *Garbutt Oil Co.*, *supra*, pp. 532-533.

Public Utilities Commission of Ohio, 298 U.S. 170, 177.

4. With respect to the question of whether a supplemental stipulation (R. 101) cured or waived the defect in the claims, this contention was not presented to the District Court or the Court of Appeals, but is, instead, first submitted to this Court and should not be considered. *McCullough* v. *Kammerer Corp.*, *supra*.

5. The decision below is not in conflict with that of any other court of appeals. Furthermore, contrary to taxpayers' bald assertion (Pet. 5-6) (which does not specify a single point of conflict), the decision does not conflict with any decision of this Court. None of the cases cited by taxpayer (Pet. 5-6) involved the factual questions presented here of whether a taxpayer elected to report income on the accrual or completed contract basis, or whether a particular refund claim supports a refund based on the adjustment of an accrual computation.[*] Sim-

[*] *Helvering* v. *Enright*, 312 U. S. 636, involves the question of whether a decedent's gross income must include his share of profits earned, but not yet received, by a partnership of which he was a member, where both the decedent and the partnership were on the cash basis. *Spring City Co.* v. *Commissioner*, 292 U. S. 182, involves the question of whether a debt-owing taxpayer for goods sold must be included in income in the year of sale even if the debt became partially worthless during that year. Both cases merely set forth the principle that, under the accrual method, it is the right to receive income, and not the actual receipt thereof, which determines the period in which income is reported; the Court of Appeals herein specifically recognized this principle (Pet. 17a), but held that taxpayers were not

ilarly, the cases cited with respect to the issue of whether the defects in the claims were cured or waived present no conflict.[9] In addition, contrary to

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entitled to correct an assertedly improper accrual of income because their refund claims did not sufficiently set forth such grounds. (Pet. 13a-15a). *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92, held that a taxpayer's declaration on its return of whether it was on the cash or accrual basis was not conclusive; the courts below did not consider it so, either, but merely viewed it as a relevant circumstance to be considered in determining taxpayers' intent to elect one method or another. (Pet. 10a-11a). *Weiss* v. *Wiener*, 279 U.S. 333, involves a depreciation deduction by a lessee in a long-term lease, and *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552, involves the treatment of premiums received on bonds sold prior to 1913; neither case is at all in point here.

[9] In *Tucker* v. *Alexander*, *supra*, the objection that a ground in a refund claim was not sufficiently specified was held to be waived by a stipulation; in addition, during the trial, the only issue litigated was the ground which assertedly was not sufficiently specified. Here, there was no similar stipulation which would constitute a waiver. Furthermore, the ground which was not specified in the claims (the correction of the accrual computation) was not litigated at the trial, but was first presented upon appeal.

United States v. *Garbutt Oil Co.*, *supra*, involves an attempt to *amend* a claim and is not a question involving *waiver*; the case holds that the amendment (which was directly at odds with the original claim) amounted to a new claim which was not filed in time. The case also repeats the rule that the Commissioner was without power to waive the statute of limitations. See *United States* v. *Andrews*, 302 U. S. 517. Instead of being of assistance to taxpayers, these decisions preclude taxpayers in the instant case from seeking to amend their original claims to claim an adjustment of the accrual computation (a new claim) or to show acts of waiver after March 15, 1947, the date the statute of limitations expired here.

taxpayers' alternative assertion (Pet. 6), it is clear that the case presents no important question of federal law, but instead turns on its own particular facts.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U. S. C. 1952 ed., Sec. 41.)

SEC. 42 [as amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

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(26 U. S. C. 1952 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to

clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U.S.C. 1952 ed., Sec. 43.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof:

* * * *

(26 U. S. C. 1952 ed., Sec. 3772.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.42-4. *Long-Term Contracts.*—Income from long-term contracts is taxable for the period in which the income is determined, such determination depending upon the nature and terms of the particular contract. As used in this section the term "long-term contracts" means building, installation, or construction contracts covering a period in excess of one year from the date of execution of the contract to the date on which the contract is finally completed and accepted. Persons whose income is derived in whole or in part from such contracts may, as to such income, prepare their returns upon either of the following bases:

(a) Gross income derived from such contracts may be reported upon the basis of percentage of completion. In such case

there should accompany the return certificates of architects or engineers showing the percentage of completion during the taxable year of the entire work to be performed under the contract. There should be deducted from such gross income all expenditures made during the taxable year on account of the contract, account being taken of the material and supplies on hand at the beginning and end of the taxable period for use in connection with the work under the contract but not yet so applied.

(b) Gross income may be reported for the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income. If this method is adopted there should be deducted from gross income all expenditures during the life of the contract which are properly allocated thereto, taking into consideration any material and supplies charged to the work under the contract but remaining on hand at the time of completion.

A taxpayer may change his method of accounting to accord with paragraph (a) or (b) of this section only after permission is secured from the Commissioner as provided in section 29.41-2.

SEC. 29.322-3. *Claims For Refund By Taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner

of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. * * *

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,181

April 18, 1957

JOHN P. DALEY, MINERVA B. DALEY, MORRIS DALEY, ZELMA B. DALEY, WILLIAM RADTKE, CLARA RADTKE, and HOMER BOSSE, Trustee of the Estate of Morris K. Daley, Alice M. Daley, Susan R. Daley, James D. Daley, Kathryn F. Daley, and Peter D. Daley, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: ORR, FEE, and CHAMBERS, Circuit Judges

ORR, Circuit Judge:

In July, 1942, Daley Brothers, Ltd., were awarded a contract by United States of America to construct a relocation center in Delta, Utah. Daley Brothers, Ltd., consisted of John P. Daley, Morris Daley, and Homer Bosse, Trustee of six trusts formerly created for the benefit of the Daley children. Daley Brothers, Ltd., formed a joint venture, hereafter the Venture, with William Radtke, to undertake performance of the contract. Appellants here are John Daley, Morris Daley, Bosse, and Radtke, together with their respective spouses.

The contract was to be completed on or before September 6, 1942. Several agreements supplmental to the original contract were entered into which extended the completion date to February 16, 1943, at which time the work done under the contract was accepted as finished and satisfactory by the Government.

The original contract price was $2,834,212.51; supplemental agreements increased the price to $3,653,259.12. Progress payments were made beginning with the construction period ending August 26, 1942.[1] By the end of 1942 nine progress payments had been made, amounting to $3,180,536.97, about 90% of the total contract price.

The Venture showed gross receipts of $3,655,672.28 upon its partnership return of income for 1942, indicating that the total contract price had been accrued on the books. The Venture's return indicated the partners' shares as going to Daley Brothers and William Radtke. On the

[1] Article 16 of the contract read:

"Payments to contractors—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

"(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

"(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government. . . .

"(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein."

fourth page of said return, the following appeared: "4. Check whether this return was prepared on the cash [ ] or accrual [x] basis." The Venture filed no return of income for 1943.

John P. Daley, Morris Daley, William Radtke, together with their spouses, and Homer Bosse as trustee, filed individual income tax returns for 1942 based on the 1942 Venture return.

In 1947 the Venture filed an amended partnership income tax return for 1942 and an amended return for 1943. The amended returns were accompanied by refund claims by the distributees of the Venture's net income. The Venture's amended 1942 return reported no gross receipts, profit, or loss from the Delta contract, but showed "advances" of $3,180,536.97. This was the sum of actual net progress payments received by the Venture as of December 31, 1942. The Venture's amended 1943 return showed gross receipts of $3,620,546.28, indicating the Delta contract was reported as being finished.

The identical refund claims of the taxpayers stated their claims should be allowed for the following reasons:

> "The change in the amended partnership income tax returns is for the reason that erroneous returns were filed for the years 1942 and 1943. The amended returns are consistent with the accounting procedure which was followed by Daley Brothers prior to 1942. The amended returns are to correct the Delta, Utah, contract which was completed on September 15, 1943, and erroneously included in income for the year 1942. The claim reflects the correct tax liability in accordance with sec. 6 of the current tax payment act of 1943, Public No. 68—78th Congress. Included in the correction is the amount of renegotiation refund which was erroneously deducted from income in the 1942 return. It is respectfully requested that refund in

the amount set forth in the claim and as also shown on the amended individual income tax return for 1943 be refunded."

Subsequent amended refund claims by John and Morris Daley in 1951 concerned a revision of income to the trusts created for their children, and stated almost verbatim the basis for refund in the original claims.

Each claim for refund was denied by the Commissioner of Internal Revenue.

The trial court found that the Venture was bound by its intentionally reporting 1942 income from the Delta contract on the accrual basis of accounting, and rejected the taxpayers' contention that the 1942 Venture return was on the completed contract basis of accounting, mistakenly applied.

The trial court did find, however, that under the accrual system, some of the Delta contract income did not in fact accrue until 1943, and therefore was improperly reported as 1942 income; but denied recovery of overpayment because the taxpayers failed to include the improper accrual in the refund claims as a ground for relief.

The main issues for solution are: (1) Whether the trial court's finding that the Venture elected to report 1942 income from the Delta contract on the accrual basis of accounting is supported by substantial evidence and therefore not clearly erroneous; (2) In the event we determine that the trial court's finding that the Venture elected to report on the accrual basis should be affirmed, then are the taxpayers entitled to recover the improper 1942 accruals in this action; and (3) Whether the accrual basis of accounting does not clearly reflect income from the Delta contract, so that the taxpayers are not bound by its election, and could amend to the completed contract basis of accounting for 1942 and 1943.

The District Court found:

> "The reporting by Daley Brothers Delta War Venture of all of the receipts from the War Department Contract as income on the 1942 return was not the result of a mistaken belief on the part of anyone that the contract was completed in 1942. At the time the return was filed the plaintiffs and their accountant knew the contract was not completed until 1943. All of the income from the contract was intentionally reported as accruing during the year 1942 although a portion of the income from that contract did, in fact, accrue in 1943."

and concluded:

> "That Daley Brothers Delta War Venture elected to report the income from the War Department contract for the year 1942 on the accrual basis of accounting."

The trial court further found (1) that the contract was not in fact completed as of December 31, 1942, and that this fact was obvious to everyone concerned; it discredited the testimony of the Venture's accountant to the effect that he prepared the return in the belief that the Delta contract had been completed in 1942; (2) that John P. Daley, the manager of the Venture, reported to the Army Engineers that the basis used in reporting revenue from the contract for income tax purposes was the accrual method, and not the completed contract method; and (3) that on the fourth page of the Venture's 1942 income tax return, the "accrual" box is marked for the accounting method employed in preparing the return.

We first examine the evidence upon which the trial court based its finding that the Venture intentionally elected to report income from the Delta contract on the accrual basis.

Appellants submit that the fact that all parties knew the contract was not completed on December 31, 1942, bears no relation to the question of whether the accrual method was used, and therefore cannot be said to support the finding that the completed contract basis was not used. Appellants urge that the fundamental feature of the completed contract method is the closing out of all of the receipts and expenses of a contract in one accounting period so as to reflect the net income from the contract; and that the Venture followed this method, but mistakenly used December 31, 1942, as the end of the period.

To evaluate properly appellants' contentions we must examine the concepts of the completed contract accounting method. In doing so, we keep in mind that the Venture had been organized for the sole purpose of executing the Delta contract, and therefore there are no considerations of multi-contract construction accounting involved.[2]

The crux of the completed contract method is the adjustment of the normal annual accounting period to coincide with the term of the construction contract, so that the total cost and the total revenue of the single contract are matched in a single accounting period. The annual accounting concept is rejected in favor of a period (necessarily longer than a year) equalling the time needed to complete fully the particular project.

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[2] A preliminary issue considered by the District Court, but not in issue on appeal, was whether the Venture was a new tax entity. It was stipulated that Daley Brothers, a partnership consisting of John and Morris Daley, had been keeping its books and reporting its income on the completed contract basis for many years prior to the tax year in question. The taxpayers argued below that the Venture was bound to continue the completed contract method of accounting, not having secured the Commissioner's permission to change to the accrual basis. The District Court held that the Venture was a new tax entity, and not bound to follow any previous accounting method. The statement in appellants' refund claims, "The amended returns are consistent with the accounting procedure which was followed by Daley Brothers prior to 1942.", reflects this contention.

American Institute of Accountants, Accounting Research Bulletin No. 45 reads:

"....

"9. The completed-contract method recognizes income only when the contract is completed, or substantially so. Accordingly, costs of contracts in process and current billings are accumulated but there are no interim charges or credits to income other than provision for losses. . . ."

U.S. Treas. Reg. 111, § 29.42-4 (b) (1943) provided:

"Gross income may be reported for the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income. If this method is adopted there should be deducted from gross income all expenditures during the life of the contract which are properly allocated thereto, taking into consideration any material and supplies charged to the work under the contract but remaining on hand at the time of completion."

Of course, a prime defect in the method is the lack of a periodic reflection of income; many years may pass until net income is determined, depending on the length of the project. See Herwitz, *Accounting for Long-Term Construction Contracts: A Lawyer's Approach*, 70 Harv. L. Rev. 449, 458.

Given a single project, the primary accounts may be kept upon either a cash or accrual basis. It is of little relevance under the completed contract method, for our purposes, whether the expenses are recorded upon payment, or upon the events determining liability; the test is *when* the contract costs are matched against the contract revenue, and a net income or loss figure is struck. Accordingly, in re-

porting taxable income, if it is desired to adopt a completed contract method, if otherwise allowable, the taxpayer will report taxable income from the contract upon the final acceptance of the work. See *E. E. Black, Limited* v. *Alsup*, 9 Cir., 1954, 211 F. 2d 879. *And if the taxpayer reports net income prior to the acceptance of the contract, it is indicative of an election to adopt some method other than completed contract.* Here, the Venture knew the contract was not completed as of December 31, 1942, and reporting of the estimated total contract price of the Delta contract was indicative of the adoption of the accrual method.[3]

Appellants assert that the determinative factor in reporting taxable income is the underlying method of accounting employed in a firm's records, if that method clearly reflects income, and that the Venture kept its records on the completed contract method, and thus was required to report its taxable income on that basis. Section 41 of the Internal Revenue Code of 1939[4] is cited to support the proposition that if the taxpayer regularly employs a method of accounting which clearly reflects income, he must compute his income for tax purposes on the basis of that method.

The accounting method employed on the day-to-day entries may be determinative as to whether the taxpayer has to report taxable income on the cash basis or on an accrual basis, but an election to report on the completed contract basis may be made irrespective of how the primary accounts are kept. We again emphasize that the controlling

[3] Finding of Fact VI of the District Court stated: "In the partnership income tax return for the year 1942, Daley Brothers Delta War Venture reported as income the full contract price of the War Department Contract."

[4] Int. Rev. Code of 1939, § 41, 53 Stat. 24, provided:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; . . ."

point is the time the costs and revenue from the contract are matched, and net income or loss ascertained. Therefore, when the completed contract method is sought to be used, the facts surrounding the election as to when to close the accounts, and ascertain the net income for the period, are controlling. The trial court properly considered the fact that the taxpayers knew the Delta contract was not completed on December 31, 1942, as supporting the conclusion that the taxpayers intended to elect the accrual basis to report taxable income.

Heavy reliance is had by appellants upon testimony concerning the manner in which the underlying accounts were kept. The Venture's accountant testified that he entered the total contract price as a receivable shortly after the contract was obtained, thereby bringing that figure into the income account immediately. Hence, it is argued that under an accrual method, the full contract price would not have been entered as a receivable at the beginning of the work, but only the progress payments would have been accrued as they became payable to the Venture. There are many accounting procedures grouped under the general label "accrual accounting." The fact that the contract price was recorded as a receivable does not necessarily mean the completed contract method was adopted. The essential character of the problem was brought out during the cross-examination of the Venture's accountant, to-wit:

> "Q. Mr. Rosenblatt, I didn't quite understand your explanation of the difference between the accrual basis and the completed contract basis of accounting.
>
> A. Well, the entries to a ledger on an accrual basis are the entries of events as they occur, the entries as to the billing of the accounts for work done, the entries into the books for merchandise or services received as they occur, rather than when they are paid.
>
> Q. You are talking now about what, sir, the accrual method?

A. The accrual method of accounting.

Q. Entries are made when payments are made?

A. No. Entries are made when the events occur irrespective of when payment is made or when it is received.

Q. All right. Now, what is the difference between that and the completed contract basis?

A. *The completed contract basis is a method used with an accrual basis or with a cash basis, in determining profit from the contract.*" (Emphasis supplied.)

We emphasize again that the method of keeping the primary accounts does not compel a report of taxable income on a completed contract basis.

The District Court also based its finding that the Venture intended to adopt an accrual method to report its 1942 income on the fact that John P. Daley submitted to the U.S. Engineer Department on January 26, 1943, a renegotiation form on which he stated that the Venture was reporting its *taxable income* from the Delta contract upon an accrual basis. The form submitted also contained an alternative choice of "completed contract." This admission adds weight to the finding that the Venture adopted the accrual method for tax purposes.

In evidence is a letter from John and Morris Daley, written on December 31, 1942, to William Radtke, during negotiations for settlement of accounts as of that date. The letter states that Radtke's capital account then showed $64,597.77 as his share of the profits. Any ascertainment of profits prior to the completion of the Delta contract would be inconsistent with a completed contract accounting basis.

On the 1942 partnership tax return the box labelled "accrual" was checked for the accounting method employed in making the return; this fact also supports the trial court's findings. It is contended that the label placed on the return is not controlling, citing *Aluminum Castings Co.* v. *Rout-*

zahn, 282 U.S. 92. In that case, the taxpayer's 1916 and 1917 income tax returns stated they had been made on the cash basis, but the taxpayer had computed income on the basis of inventories and accrued receivables and payables. The Court there held that a deduction, accruing in 1916, could not be had on the 1917 return upon the cash basis, since the taxpayer was actually keeping his books on the accrual method. That Court rejected the argument that the label on the return was conclusive, and looked to the substantive method of accounting employed by the taxpayer. It is not contended in the instant case that the label is conclusive, but it is a strong circumstance to be considered.

The trial court found that a portion of the Venture income did not in fact accrue until 1943, although it was reported on the 1942 Venture return. Appellants assert this amount consists of $299,430.73 not yet approved for payment by the contracting officer as of December 31, 1942, and $173,291.42 "holdbacks" from progress payments made in 1942.[5] Under accrual accounting neither item would have been included as income in 1942, and this circumstance is pointed to as indicative of the use of the completed contract method.[6] The trial court drew the inference that the accrual method was improperly applied in the case of the amounts of "holdbacks" and unapproved payments, and that the Venture should have adjusted these amounts to include them as 1943 income: See *Dally* v. *Commissioner*, 20 T.C. 894 (1953), *aff'd*, 227 F. 2d 724, 9 Cir., 1955, *cert. denied*, 351 U.S. 908.

During our consideration of this case, we became concerned with the question of whether the Venture could, in any event, elect the completed contract method of account-

[5] See note 1 supra.

[6] Taxpayers argue in the alternative that the sum of these amounts, $472,722.15, can now be considered as 1943 income under the accrual method, and that a refund is due upon that theory. This contention is discussed later in the opinion.

ing to report income from the Delta contract, in view of the definition of long-term contracts found in U.S. Treas. Regs. 111 § 29.42-4, which provided:

> "Income from long-term contracts is taxable for the period in which the income is determined, such determination depending upon the nature and terms of the particular contract. As used in this section the term 'long-term contracts' means building, installation, or construction contracts *covering a period in excess of one year from the date of execution of the contract to the date on which the contract is finally completed and accepted. . . .*" (Emphasis supplied.)

The stipulated facts disclose that the contract was awarded in July, 1942, and completed and accepted by the United States of America on February 16, 1943, a period of less than one year.

We are now satisfied, however, that the Regulations have not been interpreted to preclude reporting of contracts such as the Delta project on a completed contract basis.[7]

The reasons behind the allowance of the completed contract method make it clear that the intent of the Regulations is to handle the accounting problem arising from the contract extending beyond a fiscal year. Where a construction contract is to begin and end within a single fiscal period, it is of no consequence whether the contract was reported on the accrual or completed contract basis, as the total income or loss from the project would be reported in either case during the same fiscal year. The problem with which the Regulations deal arises when the contract extends

[7] L.A. Wells Const. Co. v. Commissioner, 46 B.T.A. 302 (1942), aff'd, 6 Cir., 1943, 134 F.2d 623, cert. denied, 319 U.S. 771 (1943); Bent v. Commissioner, 19 B.T.A. 181 (1930), aff'd, 9 Cir., 1932, 56 F.2d 99; Jones v. Smith, 10 Cir., 1951, 193 F.2d 381, cert. denied, 343 U.S. 952 (1952); Birkemeier v. Commissioner, 39 B.T.A. 1072 (1939); Anderson-Dougherty-Hargis Co., Inc. v. United States, (N.D. Cal., 1950), 96 F. Supp. 404.

beyond the end of the fiscal year, regardless of the actual duration of the contract, thus posing the question of whether some measure of income should be recognized consistent with the annual accounting concept. The contract with which we are concerned in the instant case, although running less than one year in duration, covered parts of two fiscal years. Hence, the Venture would have been eligible to use the completed contract method, but did not elect to do so.

The finding that the appellants intentionally made their 1942 returns on an accrual basis is affirmed.

Appellants ask us, in the event we find that the Venture is bound by an election of the accrual method, to order a remand of the case for a determination of the amount of refund due them because of an error in the application of the accrual method to the 1942 income return. It is alleged that the sum of $472,722.15 was improperly accrued as 1942 income, which properly should have been included in the 1943 income return. The sum consists of progress payments paid in 1943 under the contract, and also "holdbacks" from progress payments made in 1942, and actually paid in 1943.[8] The trial court found that the items were improperly accrued as 1942 income, but further found that the refund should not be made, because the basis for recovery stated in the refund claims and complaint was upon the ground that the income from the Delta contract was included in 1942 income under an erroneous application of the completed contract method of accounting; and that a proper application of the completed contract basis would shift the contract income to 1943.

> "It is of course the law that a suit for refunds of taxes must be based on a claim previously filed with the Commissioner, and that the claim must set forth in detail each ground on which a refund is claimed and facts

[8] See note 1 supra.